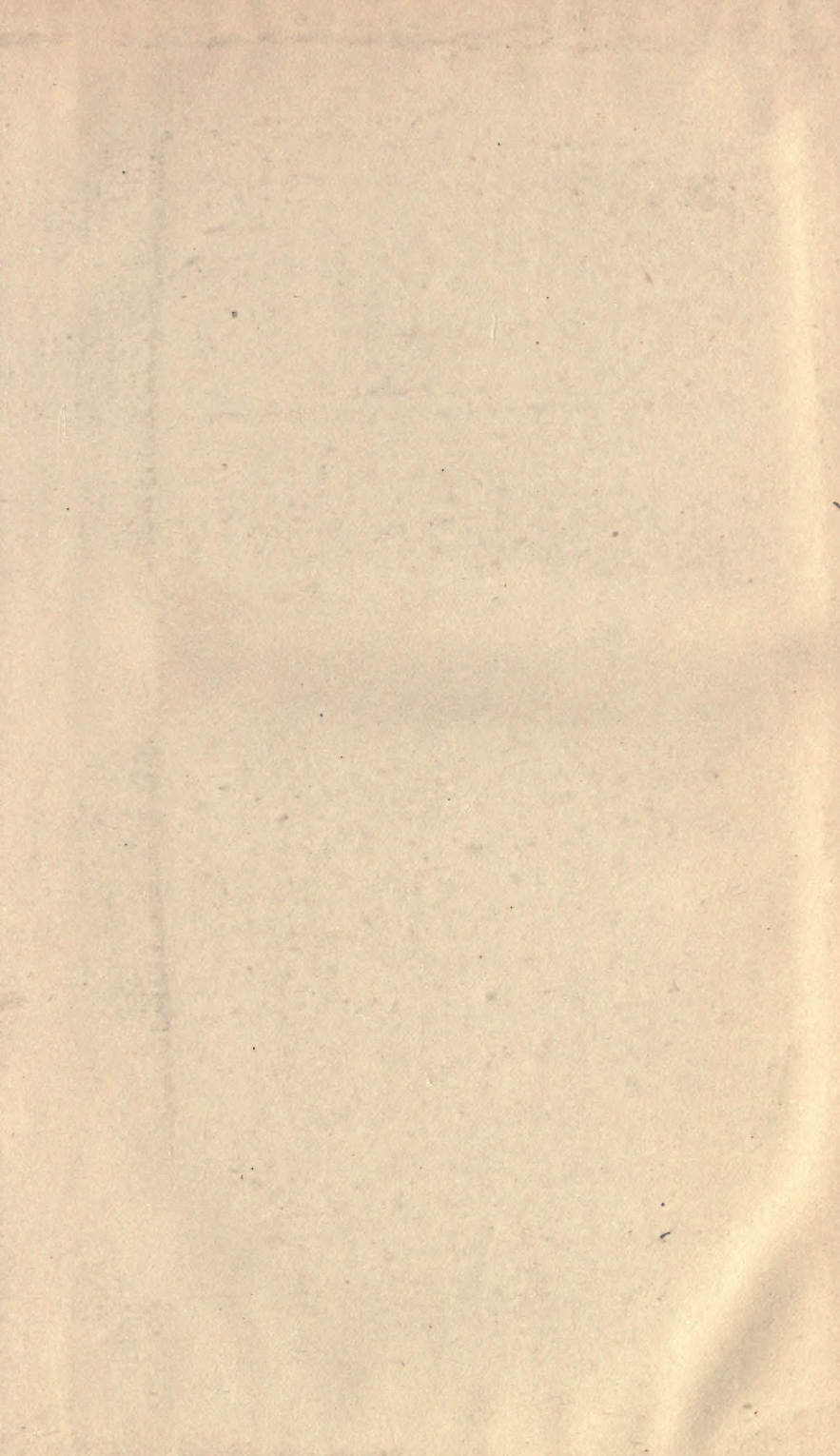


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New York (State) Reports.

11

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW-YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY

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AND

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T A B L E

OF THE

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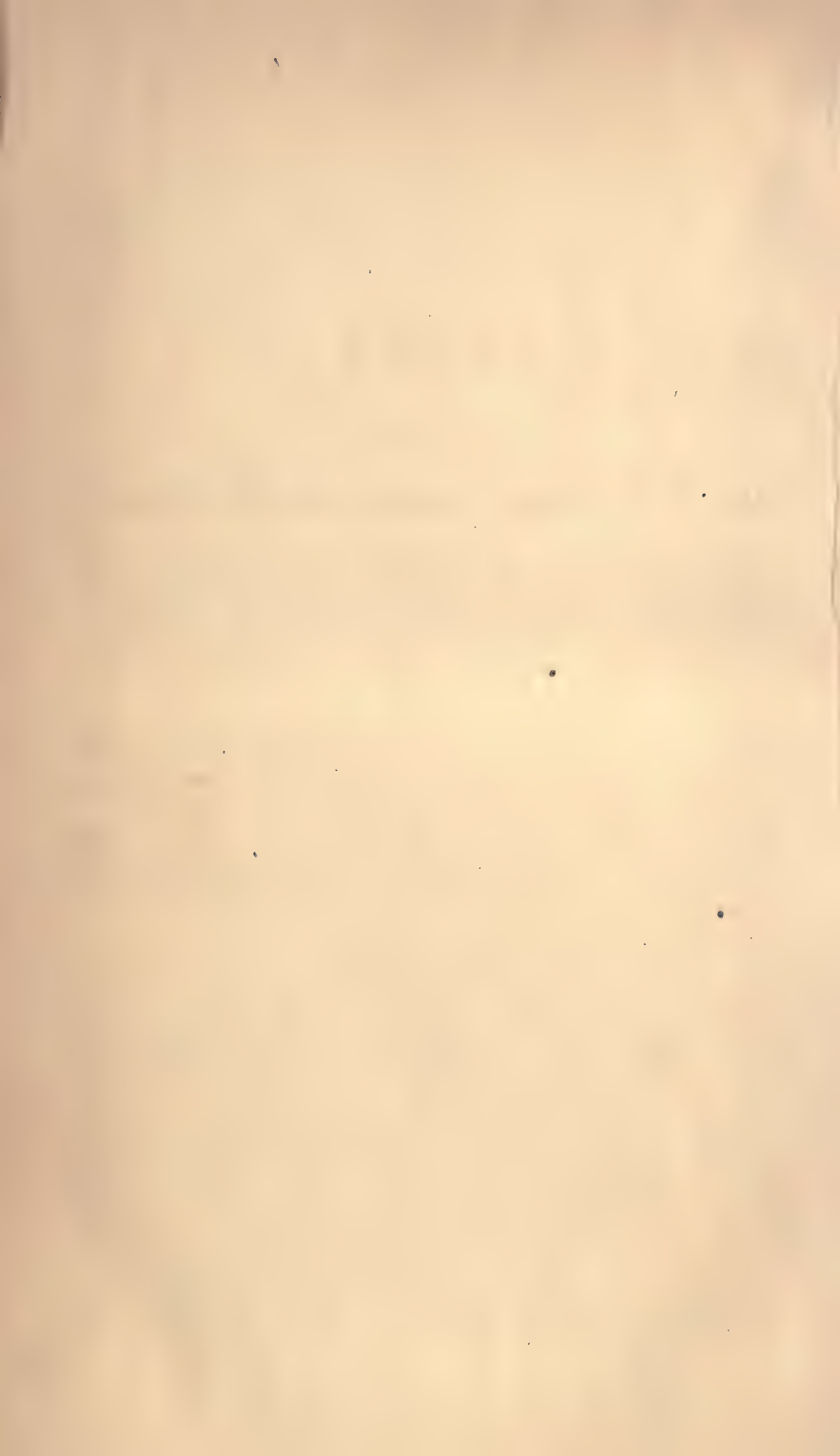
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NEW-YORK.

NEW SERIES.

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New York Superior Court; Special Term, April, 1868.

JURISDICTION OVER BOARD OF HEALTH.—PUBLIC AND PRIVATE STATUTES.

The provision of section 16 of article III. of the Constitution of 1846,—that no private or local bill shall embrace more than one subject, which shall be expressed in its title,—is confined to private or local laws. It has no effect upon general statutes; but they may embrace as many subjects as the legislature see fit to include in them.

The act of 1866 (Laws of 1866, 114, ch. 74),—creating a Metropolitan Sanitary district and Board of Health,—is a public or general statute, and not a local one; for the reason that it confers general powers upon the officers created by it, and contains penal provisions applicable to all persons, wherever residing, who violate the act.

The act of 1867 (2 Laws of 1867, 2410, ch. 956), inasmuch as it is in aid of and additional to the former act, is likewise to be deemed a public or general statute.

The explanation given in *Bretz v. Mayor, &c. of New York* (3 *Ante*, 478), of the distinction between public and private or local statutes—re-asserted.

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Motion for a temporary injunction.

This action was brought to obtain a permanent injunction restraining the defendants, who were the commissioners of Police for the Metropolitan Police district, from placing police upon the sidewalks in front of the auction store kept by the plaintiff, for the purpose of warning persons from entering therein.

The plaintiff now moved for an injunction pending the suit.

The defendants took a preliminary objection to the jurisdiction of the court, founded upon section 9 of the "Act relating to the Metropolitan Board of Health, and to the duties and powers of the commissioners of said board, and the salaries of their subordinates," passed in 1867 (2 *Laws of 1867*, 2410, ch. 956), which section is as follows: "No preliminary injunction shall be granted against the Metropolitan Board of Health, or of Police, or its or their officers, or against the commissioners of said board, in their capacity as a board of excise, or against the last-named board, except by the supreme court, at a special or general term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made."

Robert D. Holmes and Charles S. Spencer, for the motion.

A. J. Vanderpoel, opposed.

MONELL, J.—The superior court of the city of New York has general power, under the jurisdiction conferred upon it by the thirty-third section of the code of procedure, to grant the relief demanded by the plaintiff in this action, unless it is deprived of such power by the provisions of the act of 1867. Such court was created by the legislature, and derives all its jurisdiction and powers from that body. Those powers and jurisdiction can at any time be enlarged or diminished by the legislature.

If, therefore, that part of section 9 of the act referred to which relates to the defendants in this action is valid, there can be no doubt, I think, that this court is not allowed to entertain this motion.

The act creating a metropolitan sanitary district and board of health was passed in 1866 (*Laws of 1866*, 114), and the act of 1867, which contains the section I have quoted, is in aid of and additional to the former act, and in its effects is to be regarded *in pari materia*.

The title of each of the acts expresses but a single subject, and that relates to the board of health. The board of police is not named in the title; and any provisions which relate to any subjects other than such as are expressed in the title, are void, under the sixteenth section of the third article of the constitution, if the act is a private or local law.

I do not think it necessary, on this motion, to determine whether the provision which limits jurisdiction to the supreme court, so far as it relates to the board of police, is a different subject from such as is expressed in the title of the act. There is another ground, which, in my judgment, must control the decision.

The constitutional provision is confined to *private or local laws*, and has no effect whatever upon any provision contained in a *general* statute. Such latter statutes may embrace as many and as incongruous subjects as the legislature may see fit to include in them.

Nor do I find any difficulty in applying the limitation of jurisdiction, as contained in the section referred to, to the board of police and its officers. They are expressly named; and I can find no reason for supposing the legislature did not intend to confine applications for injunctions against such board and officers, to the supreme court. If the act is a general statute, its title was of no consequence; and it would be quite as valid if it had no title whatever. Such statutes require only an enacting clause (*Const.*, Art. III., § 14).

An examination of the statute under consideration has satisfied me that it is a public, and not a private or local

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law, and, therefore, not exposed to the constitutional objection.

I recently examined this question in the case of *Bretz v. Mayor, &c. of New York* (3 *Abb. Pr. N. S.*, 478), and there pointed out the distinction between general and private statutes. I then endeavored to show that statutes local in one sense, may nevertheless be in some cases general statutes; and that it was not necessary, to render a statute a public act, that its provisions should be equally applicable to all parts of the State. It was enough that they extended to all persons doing or omitting to do an act within the territorial limits described in the statute. Another distinction which I pointed out was, that all statutes which are of a penal nature are public laws, although they may be limited in their operations and effects to particular localities or parts of the State. I referred to several cases in support of these distinctions (*Pierce v. Kimball*, 9 *Greenl.*, 54; *Burnham v. Webster*, 5 *Mass.*, 266; *Jenkins v. Union Turnpike Co.*, 1 *Cai.*, 86; *Bank of Utica v. Smedes*, 3 *Cow.*, 684; *White v. Syracuse & Utica R. R. Co.*, 14 *Barb.*, 559; *Herisdia v. Ayres*, 12 *Pick.*, 344).

These cases abundantly establish that all local laws which are either penal in their nature, affecting all who offend their provisions, and all remedial statutes, where all persons may come within their purview, are general and not private laws.

The act creating the metropolitan sanitary district is essentially a penal, and, therefore, a public act.

A brief examination will establish this. It provides that any person omitting to keep a registry of births and deaths shall be liable to a fine of ten dollars. The police may arrest any person who shall violate any act or thing forbidden by any law or ordinance of the board of health which offense is declared to be a misdemeanor. Courts may punish for contempt, and enforce obedience of the orders of the board. The board is authorized to make such by-laws, rules, and regulations as it may deem advisable for the protection of life and health, which by-laws may be enforced by a penalty not exceeding fifty dollars

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for each offense. And generally the act provides that whoever shall violate any of the provisions of the act, or any order of the board, or any by-law or ordinance thereof, or shall obstruct or interfere with any person in the execution of any order of the board, or any order of the board of police, or willfully omit to obey any such order, shall be guilty of a misdemeanor, and be liable to be indicted and punished for such offense.

The general scope and purpose of the act is to protect the public life and health, and a very large portion of the powers conferred upon the board to carry out the objects of the law are of a mixed magisterial and police character; and although limited in their functions to a fractional part of the State, affect all persons who offend its provisions, or are brought within its purview. The board of health is comprised in part of the police commissioners, which commissioners, in their capacity of police officials, are directed to co-operate with and assist in enforcing obedience to the orders and ordinances of the board of health, and to cause the arrest of all offenders.

In these large and general powers, which are so liberally and properly given to the board of health, all the people of the State are interested, to the extent at least, that all the people are affected more or less by the sanitary condition of this vast and populous city. So all the people of the State are amenable to the provisions of the law, and may be subjected to its penalties.

In determining that the act under consideration is a penal statute, whose penalties reach all persons, whether inhabitants of the metropolitan district or otherwise, I have disposed of the only objection to its validity; and it follows, under the competency of the legislature to deprive this court of any of its jurisdiction, that the motion for a temporary injunction cannot be sustained.

The suggestion that this was a motion for a permanent or perpetual, and not for a temporary injunction, and, therefore, not within the letter of the statute, has no force. All injunctions are temporary which are *pendente lite*. Permanent injunctions can be obtained only by a judg-

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ment of the court after a trial of the action (1 *Barb. Ch. R.*, 613; *Code*, §§ 219-221).

The motion must be denied, with \$10 costs.

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CASWELL *against* DAVIS.

New York Common Pleas; Special Term, Dec., 1867.

INJUNCTION.—RIGHT TO TRADEMARK.

A person who forms a new composition, and invents a *new word* to characterize it, is entitled to be protected in the exclusive use of such word as his trademark; and an injunction will issue to restrain others from employing it to designate a similar article."

The fact that the word thus claimed as a trade-mark, is compounded of two or more words whose meaning was previously well known, will not necessarily defeat the right to an injunction, if the compound word is new.

The plaintiff invented a *new medicine*, and formed the compound word "*Ferro-Phosphorated*," to designate it; such combined word being new.—*Held*, that he was entitled to the exclusive use of this compound word, and to an injunction to restrain a rival dealer from using that word to designate a similar medicine.

Motion to dissolve an injunction.

The action was brought by Philip Caswell and others, to restrain defendant from infringing the plaintiffs' trademark. A preliminary injunction was granted, which defendant now moved to dissolve.

J. D. Billings, for the motion.

Paris G. Clark, opposed.

VAN VORST, J.—The claim of the plaintiffs in this action is, that the name affixed by them to the medicine which was first compounded by them in 1861, "*Ferro-Phospho-*

rated Elixir of Calisaya Bark," is the subject of a trademark, and that it is their property by priority of adoption, and cannot be appropriated by any other persons, to any article similar to the one manufactured by them.

The plaintiffs do not seek to enjoin the defendant from manufacturing, and selling his compound, or any other mixture composed of any elements, but they insist that he shall not sell it with a label bearing upon it, the name "Ferro-Phosphorated Elixir of Calisaya Bark."

The medicine which the plaintiffs claim to be so useful, and healthful in its application, as a remedial agent, and to be a source of great profit to them, was first prepared in their establishment with their own materials by themselves, and their clerk, Coffin, under their directions. The name by which it is designated was composed and applied to it first by them. Whatever Coffin did in the matter, whatever inventive skill he exhibited or experiments he performed in this preparation were under their advisement, as a clerk in their employment, and for the benefit of his principals.

The recipe for the composition, and the compound itself, were the property of the plaintiffs, as was the name invented and applied; if the name adopted can be the subject of property.

There was some evidence tending to show that similar preparations in some of the essential elements, had been made and were in use before the plaintiffs experimented on or produced their article, but it is not established that any mixture composed of all the ingredients used by plaintiffs, or having a name in all respects similar to that adopted and applied by plaintiffs, was in use or known to the public before the plaintiffs introduced their medicine.

The Elixir of Calisaya or Peruvian Bark was in use, and perhaps in solution with iron in some form. But this case shows that this composition, with its particular and specific substances, was first introduced by the plaintiffs under its peculiar name "Ferro-Phosphorated Elixir of Calisaya Bark," and that they first applied the specific words

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"*Ferro-Phosphorated*" in composition, to any medicine.

The question presented is, is this name, as combined and arranged by plaintiffs, the subject of a trade mark, and can they be protected in its exclusive use?

The case of *Wolfe v. Goulard* (18 *How. Pr.*, 64), is a leading one on this particular branch of the law of trade-marks.

Mr. Justice INGRAHAM, who delivered the opinion in that case, says "that when a person forms a new word to designate an article made by him, which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it, as against others who attempt to use it for a similar article. But such an exclusive right can never be successfully claimed of words *in common use previously, as applicable to similar articles.*"

In the case of *Burnett v. Phalon* (9 *Bosw.*, 192), Mr. Justice PIERREPONT says: "No one can appropriate a word in general use as his trademark, and restrain others from using that word." In considering the case before the court in the light of those authorities, two facts are to be regarded:

The article compounded by plaintiff as a whole was original with them. In the condition it was presented to the public, it was new—as it was a recent composition, it would, of necessity, require a characteristic name, if its elements were to be indicated in its appellation. Compounded of substances known principally to chemistry, which science has a nomenclature peculiar to itself, the words to distinguish it would be in a language familiar to chemists, and that limited class of persons who deal in drugs and chemicals.

It is true that the meaning of the words singly, which mark the compound in question, is known to a large class of persons other than those designated; but as far as the word "*Ferro-Phosphorated*" is concerned, it cannot be said that it is in common or general use, or that it is even understood by the great number of persons

who take the remedy on the advice of a physician, as indicating the true nature and character of the mixture, unless the general advice and direction of the physician may suggest it.

Such persons may, and doubtless do in most cases, understand that the medicine ordered contains Peruvian bark and iron; but as they read the label on the bottle, they do not learn from it what the article really is, although its elements are generally indicated by the words used.

They are not like words in general or common use, in any true sense, which carry to the mind of all classes, instantly the eye lights on them, the true character of the contents of the package upon which they are placed. All understand what the words "Tobacco," "Gin," "Brandy," "Cotton Yarn," mean; but the words "Ferro-Phosphorated Elixir of Calisaya Bark," would in general, be unintelligible to most persons.

I am not certain that the distinction I have taken in respect to the particular words in this case, provided the words be strictly and in chemical language correct, removes it from the principles so well considered and clearly established in the case of *Wolf v. Goulard*, or *Burnet v. Phalon*.

But the views above expressed, it appears to me, apply with great force to the words "Ferro-Phosphorated." There is nothing to show that this *compound word* was ever used before it was so applied by plaintiffs, to indicate any preparation—and I have been referred to no book in any language in which it can be found. I have resorted to several chemical works and medical dictionaries, and find no such compound word. "Ferrum," of which "Ferro" is a form, is a common word in the Latin; and "Phosphorated" is recognized by Webster as an English word. But I am of the opinion that no such word as "Ferro" and "Phosphorated," in combination, is to be found in any language, except the forming of it by plaintiffs has had the effect to introduce it; and if so, plaintiffs are entitled to the credit and use of it. The combined word, I am sat-

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ified, is philologically incorrect. I do not suggest that the word is meaningless, or that its elements do not indicate in a general way some of the ingredients of the preparation, but it does not do so chemically, or in an exact sense, and was doubtless arbitrarily arranged and invented by plaintiffs.

In the case of *Burnet v. Phalon*, the plaintiff had adopted as a trademark the word "*Cocoaine*" to designate a compound, prepared by him in part from *cocoa nut oil*. It was upheld on the ground that "Burnet" had contrived a word unknown to any language, and sold his mixture under that appropriate designation. The defendant in that case urged that the word used by plaintiffs was compounded from the French. I think it fairly to be inferred from the facts of that case, as they are reported, that Burnet meant by the word "*Cocoaine*" to indicate to the public the presence of *cocoa nut oil* in his mixture.

I think in this regard there is an analogy between the case of *Burnet v. Phalon*, and the one before the court,—the latter case is scarcely more strongly characterized than the former. The word "Ferro-Phosphorated" was *invented and applied* by plaintiff.

In disposing of the case we should not lose sight of the fact, that the affidavits of several physicians were read on the hearing, from which it appeared that they have used this remedy in their practice for several years, and that when they prescribe "Ferro-Phosphorated Elixir of Calisaya Bark," they intend the medicine manufactured and sold by plaintiffs of that name.

The defendant was in the employment of plaintiffs at the time the experiments were performed, which resulted in the production of their article. He was a helper in plaintiffs' manufactory, and learned from the clerk, Coffin, who had the charge of the department, the composition of the article, and the substances used in its preparation.

Defendant subsequently left the employment of plaintiffs, and commenced the manufacture and sale of a

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medicine, according to the recipe communicated to him by the clerk, while they were together with plaintiffs.

He puts up the same in bottles about the size used by plaintiffs, with a label on as follows: "Davis & Son's original and genuine 'Ferro-Phosphorated Elixir of Calisaya Bark;'" which acts plaintiffs claim are intended to induce the belief that the medicine offered by defendant is the same with that originated and prepared by plaintiffs; and that persons have been deceived and plaintiffs injured thereby.

I have come to the conclusion upon the facts of this case, that the plaintiffs are entitled to the exclusive use of the word "*Ferro-Phosphorated*" alone or in combination with any other words, and that their label to that extent is a proper subject of a trademark.

I do not think that, as to the words "*Elixir of Calisaya Bark*," which are well known and in general use, they are so entitled.

The motion to dissolve this injunction is denied; with liberty to the defendant to apply for a modification of it, in pursuance of the principles announced herein.

SMYTH *against* THE INTERNATIONAL LIFE ASSURANCE COMPANY OF LONDON.

New York Common Pleas; Special Term, April, 1868.

ENFORCING PERSONAL TAXES.—LIABILITY OF INSURANCE COMPANIES.

The case of Kelly's Application (10 *Abb. Pr.*, 208),—upon the requisites of a petition under *Laws of 1843*, ch. 230, Art. II., § 12 (same statute, 1 *Rev. Stat.*, 5 ed., 965, § 63), to enforce the payment of a tax upon personal property,—approved and followed.

Upon such a petition it is too late to question the legality of the tax.

An insurance company is not exempt from a tax imposed on corporations "doing business" in this State, on the ground they are no longer doing

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business, because they have discontinued issuing new policies, and are only engaged in collecting premiums and paying losses on old policies. Collecting premiums and paying losses is "doing business," within the meaning of the tax-laws.

Corporations are equally liable with individuals to be compelled to pay a tax imposed upon their personal property, by a proceedings under *Laws of 1843*, ch. 230, Art. II, §§ 12, 13.

Application to enforce payment of a tax upon personal property.

This case came before the court upon a petition filed by Bernard Smyth, receiver of taxes for the city and county of New York, under the act of 1843, to compel the defendants to pay a tax which had been imposed upon them, as a foreign corporation doing business within this State. The defendants had, in previous years, been taxed upon this ground; but now resisted payment, claiming that as they had discontinued issuing new policies, and were carrying on no other dealings than collecting premiums and paying losses upon old policies, they were not to be deemed "doing business" within the meaning of the tax laws.

A. R. Lawrence, Jr., for the petition.

J. W. Gerard, Jr., opposed.

BARRETT, J.—1. The objections to the petition, and all other technical objections, are sufficiently answered by reference to Judge BRADY's opinion in the matter of Kelly's Application (10 *Abb. Pr.*, 209). The proceedings have been conducted in strict conformity to the views there expressed.

2. There is nothing in the point that the receiver is authorized, by the act of 1867 (*Laws of 1867*, 752, § 11), to proceed by suit. That provision is specially applicable to individuals as well as corporations, and is plainly cumulative.

3. It is too late for the defendants to object to the legality of the tax; nor can that question be considered here. The remedy was by *certiorari* to review the assessment

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made by the commissioners. It must be assumed, therefore, that the tax is justly imposed, and that the defendants were possessed, at the time, of the amount of personal property referred to in the petition. But were the question open to review, the following authorities and statutes would seem to be decisive against the position taken by the defendants: *British Com. Life Ins. Co. v. Commissioner of Taxes*, 28 *How. Pr.*, 41; *International Life Ins. Co. v. Commissioner of Taxes*, 28 *Barb.*, 318; *Laws of 1853*, ch. 463, § 15; *Laws of 1855*, ch. 37. The case of the *People v. New England Mutual Life Ins. Co.* (26 *N. Y.*, 303), had reference only to corporations organized under the laws of the other States of the Union, and not to those of other countries.

4. The bonds and mortgages on deposit with the superintendent of the insurance department are assets of the company. They are choses in action, upon which levy cannot be made according to law, and are applicable to the payment of the tax.

5. The company is still transacting business in this city, and the bonds and mortgages, so on deposit, are a substitute for the capital of our own corporations. They constitute the security which the laws compel the defendants to afford to their creditors here. The fact that no policies are issued, does not involve a cessation, or liquidation of the business. The business of accepting yearly premiums upon outstanding policies, and of paying the losses which may accrue thereon, still continues. The utmost that can be claimed is that the business has been contracted and that its area has been further limited by the company, so that it is in a fair way, in case such policy be adhered to, of gradual extinction.

The only difficulty, in my mind, is in reference to the enforcement of the tax by the present proceedings. But a careful examination of the various statutes referred to, has convinced me that the order for payment should be granted, without considering, upon this application, the question as to whether it will be practically effectual.

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That is a matter which the applicant has doubtless considered, and upon which, as it may form the subject of a further application, I express no opinion. It is clear, however, that the legislature intended to authorize the collection of the tax by the same summary proceedings as those applicable to individuals. By the *Laws of* 1862, 319, ch. 152, sections 18, 19, 20, and 21 of the act of 1843, 314, ch. 230, were repealed. These sections provided that the sequestration of the property of corporations, in case of the inability of the receiver of taxes to collect the tax imposed. By the repeal of these sections, corporations are left in the same category as individuals, and the provisions of section 15, to the effect that the receiver, in case of the non-payment upon demand of the taxes assessed upon incorporated companies in the city, shall proceed in the collection and payment thereof in the same manner as in other cases—clearly, and without the previous ambiguity consequent upon the seeming conflict with other sections—subjects these companies to the same proceedings as those provided for individuals. By permitting sections 16, 17, 18, 19, and 20 of title 3, ch. 13, part 1 of the Revised Statutes to remain unrepealed, the legislature unmistakably indicates its intention of confining the change of remedy to corporations in this city. For these latter sections are very similar to those contained in the act relative to the collection of taxes in the City of New York, and they still continue, so far as I have been able to discover, unrepealed and applicable to the collection of taxes from corporations located elsewhere in the State.

An order must therefore be made, requiring the payment of the tax.

OSBORNE *against* ROBBINS.*Court of Appeals ; March, 1867.*

ACTION ON NOTE.—DEFENSE OF DURESS.

It is a good defense to an action upon a promissory note, brought by a party who acquired it with knowledge of the facts, that it was exacted from the maker at a time when he was under arrest upon a criminal charge, by the parties who procured his arrest, and as a settlement of claims held by them against him; notwithstanding the note was taken as a settlement of a civil claim for damages only, and without compounding the criminal charge.

Evidence of the circumstances attending the making of such a note, is competent to sustain the defense.

Appeal from a judgment of the supreme court.

This action was brought by Jerome A. Osborne against Giles Robbins and Sterling Robbins, upon a note made by the defendants on the 13th of January, 1860, for the sum of \$500, payable, with interest, to Burrill Rice and Esther Jane Rice, or bearer, one year from date.

The defense was that the note was made without legal consideration, and was obtained by extortion and fraud, to procure the liberation of the defendant Sterling Robbins, who was under duress as a prisoner, upon a charge of a rape, preferred by the payees of the note; that the charge was false; that the claim, which was made the pretext for extorting the note, had been previously settled; that the plaintiff combined with them in the wrong, and subsequently received the note, without paying value therefor, and with notice of the facts impeaching its validity.

The cause was tried at the Herkimer circuit. The judge excluded the *direct* evidence offered by the defendants in support of the most material of the foregoing allegations, viz.: that the claim for which the note was colorably ex-

acted had been previously settled; that the charge of felony was unfounded; and that the note was in fact executed to procure the liberation of the prisoner. This evidence being excluded, the jury found a verdict for the plaintiff.

It however appeared that Sterling Robbins, the son of the other defendant, was a farmer, residing in the town of Schuyler. He had no family, and Rice and his wife lived with him, as hired man and woman, from August, 1859, until the 13th of January, 1860, when the arrest was made, twelve days after the rape was alleged to have been committed, and nine days before the marriage of Sterling to his present wife, with respect to whom he had been charged with undue intimacy. On the 1st of January, Rice went away, leaving his wife and Robbins the only inmates of the house; and he did not return until the 3d of January. On the 4th of January, in consequence of something alleged to have occurred during his absence, a settlement was made between him and his wife and Robbins. The court excluded evidence that what she alleged did not in fact occur, and also excluded proof of the terms and subject of actual settlement: but it appeared by the admission of the plaintiff and Rice, when they were together, that there was such a settlement; that the sum agreed upon was fifty dollars; that Robbins had paid five dollars down and agreed to pay the other forty-five dollars "when he sold his oats."

On Thursday, the 11th of January, the plaintiff had an interview with Rice and Pierce, in the presence of the witness Parkhurst, and told him "to take Sterling up: he would not wait twelve hours before he would take him up. Rice said he had settled with Sterling, and Sterling had agreed to give him fifty dollars, and had paid him five dollars down; Osborne said he did not think that would make any difference; he should take him up any way; some one of the parties spoke about getting \$500; cannot say who; some one said he might have had \$500 as well as fifty dollars; Osborne told him to take him for committing a rape; on the Friday after this, they had

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Sterling taken, and came back from Herkimer ; I (witness) came out of the plaintiff, Osborne's, house, and plaintiff said ; 'Burrill has settled with Giles and Sterling, and got their note for \$500, and they have both signed it.' " In regard to their statement of the terms of the original settlement, the witness said ; "He settled it for fifty dollars, and paid five dollars, and the rest was to be paid when Sterling sold his oats ; nothing was said about suing Sterling ; but he said, take him with a warrant."

In accordance with the plaintiff's suggestion, a warrant was obtained for the arrest of Sterling on the 13th of January, upon Mrs. Rice's oath that on the 1st day of that month he feloniously ravished and carnally knew her. He was arrested the same day, at his residence, by a constable, who took him in irons to Herkimer, a distance of about twelve miles. The officer exacted a bonus for calling at the house of a brother, to send word to the father that his son was a prisoner. He was taken before a magistrate, and Rice and his wife soon afterwards made their appearance. Robbins asked them what this meant. Rice said that he had been advised by his friends not to settle for less than \$500. The prisoner asked him if Osborne (the plaintiff) was one of those friends, and Rice said he would not tell. Robbins told him he was alone ; that he did not know what to do ; that his folks had not come. He asked Rice if he would take \$400. He said he would not agree to it until he had seen his counsel. He said he would go and see his counsel. He was willing to take \$400, but went out, and on his return said he could not take it. Rice's counsel then came in and said the best way was to go to his office ; there were too many at that of the justice. The magistrate assented, and they went together to the office of the complainant's counsel. This was about seven o'clock in the evening. The counsel then said, if all was ready, they would go on with the suit. Robbins told them that he was then alone, that he had no counsel, and did not know what to do. They said there was a man at the railroad he could get, but did not tell his name. The prisoner renewed his offer to Rice of \$400. The latter

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whispered to his counsel, who shook his head, and he again refused to take less than \$500. The prisoner said then he would have to give them a mortgage. The counsel went for a blank mortgage, but the proceedings were here interrupted by the arrival of Giles Robbins, the prisoner's father. As soon as he had learned from his son what he was arrested for, he requested Rice to step into the hall with him, and asked him what he did this for. Rice replied that he was advised to do so by his friends; that he had settled with Sterling for fifty dollars, but that his friends told him he should not settle so; that he could have \$500 as well as fifty dollars. The constable came out into the hall and ordered them in, telling them they could not stay there and talk. After their return to the counsel's room, the justice said the suit must go right on. The father asked the privilege of giving bail. The counsel told them they could not take bail, unless the prisoner admitted the crime. The prisoner told them it was not so, and he should not admit it. Either the counsel or the justice then read to him from the Revised Statutes the penalties for the crime of rape, and told him that it was next to murder; and that he would have to go to State's prison for ten years, and probably more, and that the criminal matter could not be settled. The prisoner asked again if he could not give bail for the next day. They told him he could not; that he must go to jail if the suit did not come on. He said then he would go to jail. Rice then said if it was not settled that night it could not be settled at all; that he would settle for \$500. No civil suit had been brought, either before or after the fifty dollar settlement, and none was threatened or proposed. Rice said he had come down to sue the prisoner, but his counsel told him that he could not sue. The father and son then conferred together. Either the justice or the lawyer remarked that the damages could be settled for \$500, and at about ten o'clock at night the attorney drew up the note in suit, and the defendants signed it and delivered it to the complainants. An ostensible release was also drawn up by the lawyer, signed by the payees of the note,

and witnessed by the constable. Rice and his wife went into the other room, where they were joined by the counsel and constable, and had a laughing and jovial conversation. Three other men came out from the back room with them. There was evidence showing that the plaintiff's brother was in the attorney's back room after the arrest, taking part in the conferences, and evidence tending to show that the plaintiff was there also, though he denied that he was there in reference to this complaint.

When the party came out of the back room, the magistrate having in the mean time disappeared, the accused followed Rice and his wife down stairs, and conversed with them as to the giving of the note and the transactions which had just occurred. This conversation the judge excluded on the ground that, though Robbins was still a prisoner, what was said was not a part of the *res gestæ*. They went across the way to the tavern, and the constable called the prisoner aside, and consulted him as to what he should do with him. He told him he did not know as he could let him go, and wanted him to give bail. The old gentleman said he could have no bail unless they gave up the note. The constable then referred the matter to the attorney, who told him no bail was required, and the prisoner was accordingly released by the officer.

The constable, who was sworn for the plaintiff at a later stage of the trial, testified that the attorney told him he could hold him on it, or he could let him go, and that would be the end of it; and in this respect he was subsequently contradicted by the attorney. When the proceedings terminated it was after ten o'clock in the evening, but the plaintiff, Osborne, learned them from Rice the same night; and when he reached his own home, which was some eight or nine miles from the justice's office, he communicated the intelligence to Parkhurst before he went into the house.

The various offers of evidence on the part of the defendants having been excluded, the plaintiff introduced testimony, tending to corroborate that of the defendants on most of the material facts, but contradicting it in some

of the details. The counsel for the prosecutors testified in substance, among other things, that Rice, the justice, and himself, all notified the prisoner that it would be unlawful to settle the criminal proceedings, but lawful to settle the damages; that he drew up the papers accordingly, and publicly explained the distinction; and that though the justice went away before the matter was disposed of, he left behind him a mittimus to keep the prisoner in jail over night.

The justice was also sworn, and explained that he transferred the proceedings from his own office, which was a public place, to that of the counsel for the prosecution, because the counsel so requested; that he heard Rice say nothing, except that he claimed \$500; that the statute against compounding felonies was read, as well as the statute for the punishment of rape; that notice was repeatedly given that the offense could not be settled, but the damages could; that though he left before the close of the proceedings, he handed a mittimus to the officer; that he heard the next morning that they had settled it, and that the prisoner had gone home; that after the settlement he never had anything else to do with it; that it was dropped there, and that he got his fees for his services from the county, and nothing from anybody else.

The constable testified in substance, among other things, that he held also the office of deputy-sheriff; that he handcuffed the prisoner for two reasons—one, that on a previous occasion he had broken his word, and the other, that his horse would not stand without being held; that he did not interfere to prevent the prisoner's father and Rice from talking in the hall; that he did not let Robbins go until he was told that he could do so by Rice's attorney; and that the bonus he exacted from the prisoner for calling at his brother's on the way, was not credited to the county. The plaintiff denied that he was at Herkimer on the 13th of January in reference to this complaint; he claimed not to have been notified of all the facts in relation to the note, and to have taken it in pay for a debt of \$180, and to have given his note for the balance, payable, by its terms,

when he collected the money of the defendants on the note now in suit.

The jury having found a verdict for the plaintiff, an appeal was taken to the general term in the fifth district, when the judgment was affirmed, the prevailing opinion being delivered by Judge ALLEN, and a dissenting opinion by Judge MORGAN. That decision is reported in 37 *Barbour*, 481.

Waterman & Hunt, for appellant.

Francis Kernan, for respondent.

PORTER, J.—The plaintiff's right of recovery depends on the validity of the note in the hands of Rice and wife, the payees. He cannot claim the protection which the law extends to the *bona fide* holder of negotiable paper. He did not part with value on faith of its validity; he had notice of the facts tending to impeach it, and he instigated the process of coercion through which it was obtained.

The note was executed when the principal defendant was a prisoner; and it could not be enforced by the payees if they obtained it through an abuse of legal process, for purposes of oppression and exaction. When a party is arrested, without just cause, and from motives which the law does not sanction, any contract into which he may enter with the authors of the wrong to procure his liberation from restraint, is imputed to illegal duress. It is corrupt in its origin, and the wrong-doer can take no benefit from its execution (*Strong v. Grannis*, 26 *Barb.*, 122; *Eadie v. Slimmon*, 6 *N. Y.*, 9; *Richardson v. Duncan*, 3 *N. H.*, 508; *Severance v. Kimball*, 8 *Id.*, 386; *Watkins v. Baird*, 6 *Mass.*, 510; *Cumming v. Ince*, 11 *Ad. & E. N. S.*, 112, 119; *Richards v. Vanderpoel*, 1 *Daly*, 71, 75, 76; *Foshay v. Ferguson*, 5 *Hill*, 154). In such a case the element of voluntary assent is wanting. The parties do not meet on equal terms. The authority of the courts is perverted to unworthy uses. The instrumentalities employed to produce a consenting will are force and fraud,

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agencies which the law abhors. The prisoner is at the mercy of the accuser, and he submits to extortion as the means of deliverance from oppression under the forms of law.

The party who exacts a security from one whom he wrongfully restrains of his liberty can derive no aid from the fact that the claim he enforced by illegal means was just. He cannot be permitted to allege the outstanding obligation of another in justification of his own fraudulent act in deliberate violation of law. In all such cases, it is the simple duty of the courts to condemn the contract; and the parties are thus remitted to their antecedent rights (*Richards v. Vanderpoel*, 1 *Daly*, 71; *Strong v. Grannis*, 26 *Barb.*, 122; *Foshay v. Ferguson*, 5 *Hill*, 154; *Cumming v. Ince*, 11 *Ad. & E. N. S.*, 112, 119; *Eadie v. Slimmon*, 26 *N. Y.*, 9).

The defense that the note in question was executed under duress was available to the father as well as to the son (1 *Rolle Abr.*, 687; *McClintock v. Cummins*, 3 *McLean*, 158; 3 *Bacon Abr.*, 254, tit. Duress, B; 3 *Chitty Crim. Law*, 56; *Strong v. Grannis*, 26 *Barb.*, 122).

The rulings on the trial seem to have been made on the same mistaken theory upon which the complainants and their counsel acted in their proceedings before the magistrate.

The parties concerned in the prosecution appear to have assumed that any security they might exact from the prisoner could be enforced, if they could steer clear of the statute prohibiting the compounding of felonies. The transfer of the hearing from a public to a private office, the unusual proceeding of reading that statute to the accused on an examination for a different offense, and the repeated declaration of the complainant, the counsel, and the justice, that the offense could not be settled, but the damages could, indicate very clearly their view of the danger to be avoided. They seem to have been unmindful of the fact that the occasion was inappropriate for the settlement of private differences between the defendant and the witnesses for the prosecution, and to have overlooked the circumstance that,

in negotiating a contract with the prisoner, they were dealing with one *in vinculis*. They misapprehended the law, even upon their own theory. If there had been proof at the circuit that the defendant had in fact committed the felony with which he was charged, the public reading of the statute, and the formal notice that it was illegal to compound a crime, would have been ineffectual to conceal the actual purpose of the arrangement. In the case of *Cost v. Phillips*, cited by Judge BRADY in *Richards v. Vanderpoel*, it appeared that the defendant had been arrested and taken before a magistrate on a charge of embezzlement, and that he there united with Sparks, his father-in-law, in executing a bond to the complainants for the amount of money embezzled. The attorney for the prosecutors in that instance, as in this, told the defendants that they were not to consider there was any agreement that the plaintiffs should forego the prosecution. Lord ABINGER, however, instructed the jury that the "plaintiff's attorney saying, when the bond was executed, that it was not to be considered as an agreement not to press the prosecution, did not alter the nature of the transaction. The question was, what the parties intended. If the jury believed that the plaintiff meant, upon getting the bond, to forego the prosecution against Phillips, and that Sparks signed under that belief and expectation, the consideration of the bond was illegal, and the jury ought to find a verdict for the defendants" (1 *Daly*, 75; 1 *Bosw.*, 210).

Such would have been the rule applicable to the case, if the defendant had been guilty of the felony. But the rule of the common law for the protection of the innocent against duress and extortion is as rigid as the statutory provision for the protection of the conceded felon. There was no proof at the circuit to justify the imputation of felony. The plaintiff did not call Mrs. Rice; and her affidavit, introduced for a collateral purpose, was not competent evidence of the facts it purported to allege. There was, however, proof tending to show either that the defendant had availed himself of the opportunities furnished by Rice for illicit intercourse with his wife, or that he was

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willing to pay fifty dollars to avoid the scandal and peril of a false accusation. The allegation of Mrs. Rice that he carnally knew her, may possibly be true, though her subsequent conduct, and that of her husband, leave the question by no means free from doubt ; but the pretense that he "violently and feloniously ravished" her is inconsistent with all the circumstances disclosed on the trial. The alleged date of the occurrence was on the 1st of January. Her husband returned on the 3rd. On the following day the subject matter of her complaint, whatever it was, was settled for five dollars, and the promise to pay forty-five dollars more. It was not of so serious a character as to prevent her from living alone with the defendant in the mean time, during the absence of her husband, or to prevent them both from living with him for more than a week afterward, and down to the time when the plaintiff and others instigated the project compelling him to pay five hundred dollars more, by arresting him on a warrant for felony. The apologetic tone of Rice and his wife, in their interviews with the son and the father on the night of the examination, are equally inconsistent with the theory of guilt ; and their merriment over the successful result of the charge of felony, to which the plaintiff advised them, is quite significant as to the good faith of the accusation.

But it was the right of the defendants to prove, as matter of fact, that the charge was false. They did not defend on the ground that the note was made to compound a felony. They alleged in their answer, and claimed the right to prove, on the trial, that it was extorted from them to liberate the defendant, Sterling Robbins, from imprisonment, under an unfounded charge preferred against him by the parties who extorted it. If this was true it was a case of illegal duress, and the note was void. The evidence that the charge was unfounded was excluded by the judge. It was relevant to a vital issue, and its rejection was clearly erroneous. The ground on which the general term sustained this ruling, as appears by the prevailing opinion annexed to the case, was, "that the answer did

not allege that the charge was *unfounded*, and it was not, therefore, within any issue made by the pleadings." This was a misapprehension. We have referred to the answer, and find that the fact is there specifically alleged. A different reading of the opinion appears in the published report of the case. The ground there stated is "that the answer did not allege that the charge was *compounded*" (37 *Barb.*, 484). If that be the correct version, it is plain that the entire scope of the answer was misapprehended. The pleading is drawn with great precision and perspicuity, and it contains the precise allegation, the proof of which was rejected. The averment was appropriate to the defense of duress, and would have been inappropriate in an answer alleging the compounding of a felony.

We are also of opinion that the learned judge erred in rejecting the proof offered by the defendants, that the note was given to procure the release of the accused from imprisonment on the criminal charge. The purpose for which it was executed was a matter of fact, within the knowledge of the witness, and as to which he was competent to testify (*McKown v. Hunter*, 30 *N. Y.*, 628, 629; *Bell v. Shibley*, 22 *Barb.*, 613; *Cassard v. Hinman*, 1 *Bosw.*, 207). The defendant should have been permitted to prove the subject-matter and terms of the settlement, made on the 4th of January, between the principal defendant and the payees of the note in suit. It is not necessary to decide the question whether the agreement of compromise then concluded would be binding as an accord and satisfaction, in the nature of an account stated, in respect to indefinite and unliquidated damages; though that view of the law seems to be supported by most of the recent authorities (*Cool v. Stone*, 4 *Iowa*, 219; *McDaniels v. Lapham*, 21 *Vt.*, 222; *Babcock v. Hawkins*, 23 *Id.*, 561; *Merriam v. Leonard*, 6 *Cush.*, 150-153, per SHAW, Ch. J.; *Stockton v. Frey*, 4 *Gill*, 424; *Woodward v. Miles*, 4 *Fost.*, 294; *Billings v. Vanderbeck*, 23 *Barb.*, 546; *Crans v. Hunter*, 28 *N. Y.*, 389). It is sufficient to say that the proposed proof was appropriate, in connection with the advice of Rice's coun-

sel, that he could not sue the defendant for private damages.

It was relevant and material to the inquiry whether the claim of five hundred dollars for the same matter was made in good faith, or whether it was resorted to as a mere pretext to cover the illegal exaction.

The judgment should be reversed, and a new trial should be ordered.

PARKER, J.—This action is upon a promissory note for \$500, made by the defendant on the 13th day of Jannary, 1860, payable one year from date to Burrill Rice and Esther Jane Rice, or bearer, and transferred by them to the plaintiff. The defense set up is, that the note was obtained by extortion, duress, and fraud, and was given for an unlawful consideration—the settlement of criminal proceedings instituted for an alleged rape by the defendant Sterling Robbins, upon the said Esther Jane Rice; and that the plaintiff received the note, without the payment of value therefor, and with notice of the consideration, and the circumstances under which it was given. The action was tried at the circuit, by the court and a jury, and resulted in a verdict for the plaintiff for the amount of the note.

The case shows that Sterling Robbins, one of the makers of the note, was complained of before a magistrate, at the instance of the plaintiff, by Esther Jane, the wife of Burrill Rice, they being payees of the note, for a rape upon her, and was, thereupon, arrested upon criminal process, and taken before the magistrate, and detained until he gave the note in question, with Giles Robbins, his father, as surety, and then was suffered to go at large; and that no further criminal proceedings have been had against him, though evidence was given tending to show that the note was given for the civil damages to the payees, and not in settlement of the criminal complaint; also that the plaintiff, when he took the note, was cognizant of the consideration, and of the circumstances under which it was given. After such evidence was given, the defendant offered to show that on

the 4th of January, 1860, an agreement was made between Burrill Rice and defendant Sterling Robbins, by which Rice settled with Robbins for the damages which he had sustained from the alleged rape by Robbins upon his wife, Robbins agreeing to pay him fifty dollars in full thereof, five dollars of which he paid down, and the residue he was to pay when he should have threshed his oats. This was objected to by the plaintiff as incompetent and immaterial, and excluded by the court.

There is one view in which I think this evidence is competent. One line of defense is that the note is given in settlement of the criminal charge, and any evidence tending to show that fact was admissible. Now, if it could be shown that Rice had already settled the claim for civil damages arising out of the alleged rape for fifty dollars, part of which had been paid, it tended to show that this note for \$500 was not given in settlement of those damages, but really in settlement of the criminal charge, as alleged in the answer. The defendants, therefore, were entitled to put the fact before the jury, by the testimony of the witness by whom they offered to prove it, to be weighed with the other evidence which had already been given tending to the same result.

The defendants also offered to prove the falsity of the charge of rape, and that it was part of a plan or combination to extort money on the note in suit, from the defendants. This was objected to and excluded. I think this offer of the defendants was clearly admissible. If the defendants could have shown that the payees of the note combined to extort money from the defendants by a false charge of rape against the defendant Sterling Robbins, and thereby procured the note to be given, it was within the line of defense marked out by the answer, and, in its character, competent and material as a defense to the note in the hands of the payees, or of any person who received it with notice of such facts.

The defendants having excepted to the exclusion of the evidence above referred to, it follows, if I am right in the view above taken, that they are entitled to a new trial.

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I am of the opinion, therefore, that the judgment should be reversed, and a new trial granted.

All the judges concurred in the foregoing opinions, except GROVER, J., who concurred in the result, and HUNT, J., who took no part in the case.

Judgment reversed.

MILLER *against* HALSEY.

Supreme Court, First District ; Special Term, April, 1868.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—WHEN SET ASIDE.

An action will not lie to set aside an assignment of property in trust for creditors, which is good upon its face, upon the ground that it was made with intent to defraud creditors, upon mere proof that the assignor, fraudulently (no collusion on the part of the assignee being shown), concealed and withheld from the assignee, assets which ought to have been delivered under the assignment.

The remedy for such acts by an assignor is to be sought in proceedings by the assignee to compel the delivery of the assets withheld.

Trial by the court.

This action was brought to set aside an assignment made by the defendants Halsey and Northum, to the defendant De Camp, for the benefit of creditors of the assignor. The general evidence relied upon by the plaintiffs to show the assignment fraudulent is stated in the opinion.

Nelson Smith, for the plaintiffs.

Amasa A. Redfield, for the defendants. — I. It is not pretended that the assignment in question is void

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upon its face as matter of law. It follows that, to sustain the action, the fact of a fraudulent intent in making it must be proved by evidence. And this must be an intent to defraud by making the assignment; not to defraud by some entirely independent act (*Wilson v. Forsyth*, 24 *Barb.*, 105; *American Exchange Bank v. Webb*, 15 *How.*, 193).

II. The facts alleged (admitting them to be true), are not such, as in themselves, constitute fraud; but, to use the language of the court in *Wilson v. Forsyth* (24 *Barb.*, 103), are such "as might and probably would have been done had no assignment been made or dreamed of;" therefore they are not proof of fraud in making the assignment.

III. The fraud, if any, must be in *making* the assignment. And there is no pretense that there was any fraud in that; but only that after making an assignment of *all* this property, the assignors failed to make a *delivery* of it all to the assignee. 1. The fact of a *transfer* of all their property cannot be denied, for such is the wording of the instrument. In the act of assignment there was good faith; and it is as to this act only that fraud can be predicated, or that the court can be asked to adjudicate. 2. If there was delay or fraud on the part of the assignors to *deliver*, under their assignment, the property assigned, the assignee has the right, and it is his duty, to sue for or take other steps to get it in for the benefit of the creditors. This is no fraud on the creditors therefore (*McMahon v. Allen*, 35 *N. Y.*, 403).

IV. Since the decision in *Wilson v. Forsyth* (24 *Barb.*, 103) and its approval by DAVIES, J., in *American Exchange Bank v. Webb* (15 *How. Pr.*, 193), it seems settled law that the fact that the debtor does not *deliver* all the property assigned (but absconds with it or appropriates it otherwise to his own use), does not of itself invalidate the assignment.

V. The *badges of fraud* relied upon by plaintiffs may all be included in the one charge, that, although the assignors made a general assignment of all their property for

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the benefit of creditors, good upon its face, they withheld a part of it from the assignee. This is no proof of fraud (Wilson v. Forsyth, 24 Barb., 103).

VI. Even if *failure to deliver* to the assignee could be deemed an index or badge of fraud, the *assignee* must be proved a party to the fraud, to make it effective to set aside the instrument. A delivery implies two persons, one to give, another to receive. A perfect delivery of property must be the act of two parties jointly. Fraud cannot be predicated of the *giving* by one and at the same time good faith in the *receiving* of the other (Carpenter v. Muren, 42 Barb., 300; Newman v. Cordell, 43 Id., 448). Now there is no pretense, at all events there is no proof, that Mr. De Camp, the assignee, has been a party to any fraud alleged against the assignors.

SUTHERLAND, J.—The defendants, Mary A. Halsey and Oscar P. Northum, were partners doing business under the firm name of Halsey & Northum, as merchants; and by an assignment dated October 30, 1865, the execution of which was acknowledged October 31, assigned all their property, in terms which would carry all their property, partnership and individual, to the defendant De Camp, in trust, first, after paying the expenses of the execution of the trust, to pay certain partnership debts in the order specified (among others, first, in full, an alleged partnership debt due De Camp); second, to pay all partnership debts *pro rata*; third, to pay all the individual debts named in the account of the creditors of the assignors; and of the sums owing to such creditors, De Camp is stated to be a creditor to the amount of \$9,985.11, the amount for which he is preferred; and in the inventory of the assigned estate he is stated to be indebted to the assignors, on book account, in the sum of about \$16,175.42.

There is no allegation in the complaint, nor was there any evidence on the trial, that the assignors had any individual property at the time of the assignment. This action was brought by the plaintiffs as partnership creditors, having judgment with execution returned *nulla bona*, to

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set aside the assignment, as made in fraud of the plaintiffs and other creditors.

The complaint alleges that the defendants, Halsey & Northum, fraudulently combined with said De Camp in making the assignment, with the intent to defraud their creditors; and that the assignment was made as a mere cover, and to enable the said Halsey & Northum, by collusion with the said De Camp, to retain, use, and appropriate to their own use a large portion of their property, notwithstanding such assignment, and by means of said assignment to cover the same from their creditors.

I do not think the proofs in this case establish their allegations of fraudulent combination and collusion with De Camp. In view of his evidence I should not be justified in finding or holding that he accepted the assignment with any fraudulent intent, or with a knowledge of any alleged fraudulent purpose or intent of the assignors in making the assignment, or with a knowledge of any of the fraudulent acts of the assignors, hereafter referred to, just previous to the assignment.

De Camp proved his debt to the amount he was preferred, and he acknowledged his indebtedness to the amount stated in the inventory, and he testified to his responsibility and ability to pay the balance. Indeed no question was made as to his ability to pay the balance due from him.

It is not pretended that the assignment is void on its face. The evidence does not establish—I think I may say it does not tend to show—that the preferred debts, any or either of them, were not *bona fide*. The evidence does not tend to show that the assignors reserved, upon or by any secret trust or otherwise, any interest in the property or estate mentioned in the inventory and which they intended the assignee should have the administration of under the assignment.

I think I may say it would be quite consistent with the evidence to hold that the assignors intended and expected that the property mentioned in the inventory and which they intended the assignee to take possession of and ad-

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minister under the assignment, would be appropriated, under the assignment, to the payment of *bona fide* debts. But there is evidence tending to show, and which I shall assume does show, that the assignors, a few days before the assignment, fraudulently bought merchandise to a considerable amount on credit, which they did not intend to pay for, and never have paid for; that at the time of the assignment the assignors had a large amount of money which was not mentioned in the inventory, nor delivered to the assignee, and never has been delivered to the assignee, and which they intended fraudulently to conceal, and did fraudulently conceal, both from their creditors and their assignee; and that the money so concealed was the result or proceeds of the merchandise so fraudulently bought, and of other merchandise sold shortly before the assignment, and of collections made in contemplation of the assignment; and that the possession of the money was attempted to be concealed, a portion of it by false entries in the books of the assignors, and probably a small portion of it by being put or left in the hands of third parties, upon secret trust for the use of the assignors.

There is nothing in the case to show that the merchandise so fraudulently bought, just before the assignment, was bought with the intention of increasing the fund or property which the assignors intended to pass under the assignment to be appropriated under it to the payment of preferred debts. The evidence tends to show that the assignors intended to conceal and keep the proceeds of that merchandise and the other money so concealed both from their creditors and their assignee, for their own benefit.

Now the question is, whether these fraudulent acts of the assignors, just before their assignment, or this fraudulent concealment of the money both from their creditors and their assignee, renders their assignment fraudulent and void.

I do not see how the assignment could or did aid the assignors in their fraudulent scheme; and, therefore, I cannot see how I can say that it was made with the intent to hinder, delay, or defraud their creditors.

The assignment carried all the property of the assignors, including the money so fraudulently concealed both from creditors and assignee and not in the inventory. The assignee had and has ample power, and no doubt it was and is his duty under sections 1 and 2 of the act of April 17, 1858 (*Laws of 1858*, 506), to unmask the fraud of the assignors and to reach the moneys so fraudulently concealed. (See also *McMahon v. Allen*, 35 *N. Y.*, 403; and *Brownell v. Curtis*, 10 *Paige*, 210; disapproving *Bayard v. Hoffman*, 4 *Johns. Ch.*, 450).

I refer to *Wilson v. Forsyth* (24 *Barb.*, 105), and *American Exchange Bank v. Webb* (15 *How. Pr.*, 193), as showing that the non-delivery of the money to the assignee and the fraudulent concealment of it from him and the creditors, without any knowledge of or participation in the fraud on the part of the assignee, would not make the assignment fraudulent and void.

As to the point that the assignment was delivered before the execution of it was acknowledged, I think the presumption is that it was not delivered until after the acknowledgment.

The complaint must be dismissed; but, under the circumstances, without costs to either party as against the other.

If the assignee's answer in this case had been as open and frank as it might probably truthfully have been, I should have directed his costs to be charged on the fund; but, considering the answer which was put in, I shall not make any such direction.

Complaint dismissed, without costs.

Duncan v. Berlin.

DUNCAN *against* BERLIN.*New York Superior Court; General Term, October, 1867.*

ATTACHMENT.—MONEY PAID BY MISTAKE.

Upon an attachment being levied on a debt due from the present plaintiffs to the debtors in the attachment, the plaintiffs paid to the sheriff a sum which they supposed to be the balance due from them to the debtors. They afterwards discovered a mistake in their accounts, showing that the true balance was less than they supposed and had paid.—*Held*, that they could not maintain an action to recover back the excess from the attaching creditors; to whom in the mean time the amount, less fees, had been paid by the sheriff. The plaintiffs must bear the consequences of their own mistake; the attaching creditors being in no way chargeable with it.

Appeal from a judgment.

W. D. White, for the appellants.*F. C. Cantine*, for the respondents.

BY THE COURT.—GARVIN, J.—This is an appeal from a judgment entered upon findings of law and fact, made by Justice BARBOUR, on July 22, 1867.

The facts established at the trial show that in January, 1866, a suit was commenced in the supreme court, by the defendants in this action, against Hamilton Blagge and Ogden P. Pell, to recover about \$1,600; and therein an attachment was issued to the sheriff of New York, who called upon the plaintiffs with the attachment, served it, and was informed by the plaintiffs that, including property unsold, they had in their hands about \$1,900 due to Blagge & Co. Judgment was entered against Blagge & Co. on March 17, 1866, and on the 19th of March, execution was issued, of which the plaintiffs were informed, and then and thereafter informed the sheriff and attorneys for defendants that they had in their hands property sufficient to pay the ex-

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ecution. On May 25, 1866, the plaintiffs paid the sheriff, on the execution, \$1,861.31, and on the 2nd day of June, \$63.02, for which the sheriff gave the plaintiffs a receipt as follows:

“SUPREME COURT.—JACOB BERLIN v. HAMILTON BLAGGE *et al.*—Received, New York, June 2, 1866, from Messrs. Duncan, Sherman & Co., \$1,924.33, in full for proceeds of sale, the said money being attached January 16, 1866, in the hands of Duncan, Sherman & Co., and paid over by them under protest.

“Received payment,

“THOMAS FEARING, *Deputy Sheriff*,

“*Per* DAVID MEELIO, *Deputy Sheriff*.”

On the 7th of June, the sheriff returned the execution satisfied; and paid the money over to the defendants, excepting \$194.14, his fees.

It also appeared that while the sheriff had the attachment and execution in his hands, property came to the hands of the plaintiffs belonging to Blagge & Co., amounting to \$2,000 and upwards, which was disposed of by them. The plaintiffs subsequently discovered an error in their account with Blagge & Co., of \$1,000, making the balance \$1,900, instead of \$900, as in fact it should have been. That error was not discovered till after the 23rd of May.

If this had been a case of mutual mistake of facts in respect to which both parties were equally bound to inquire, the money might have been recovered (*Bank of Commerce v. Union Bank*, 3 *N. Y.* [3 *Comst.*], 230); but that is not the case. The defendants were not bound to make inquiry, nor were they mistaken in any fact. The defendants stood in the relation of plaintiffs enforcing payment against the property and effects of Blagge & Co., found in the hands of the plaintiffs in this action. The plaintiffs concede and admit this, state the amount of property, and by their receipt admit it was attached on the 16th of January, 1866; and on the 25th of May they paid over the amount to the sheriff, and he paid it to the defendants,

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less his fees. The defendants only knew of the legal steps taken to recover their demand, and were not bound to inquire how much property of Blagge & Co. was in plaintiffs' hands. The mistake was solely that of the plaintiffs.

It is said by MARCY, J., in the case of *Franklin Bank v. Raymond* (3 *Wend.*, 67), that it is a general principle of law that if a party pays money under a mistake of the real facts, without any negligence imputable to him for not knowing them, he may recover such money. Can it be said that the money in this case was paid without imputation of any negligence on their part for not knowing of their mistake? We think not. The error was very gross, both in amount and the length of time it remained undiscovered. The consequences of this mistake must either fall upon the plaintiffs or the defendants. There was certainly a want of ordinary caution and care in making up and keeping the account existing between the plaintiffs and Blagge & Co., and upon this error the mistake of fact happened. It was in the plaintiffs' books that the error occurred—not Blagge & Co.'s, but theirs, doubtless kept by clerks; but the plaintiffs are responsible for their clerks and their acts, and by them they must be bound.

It cannot be said, either, that it is against conscience for the defendants to retain the money (*Price v. Neal*, 2 *Burr.*, 1354). If the defendants had been told the "real facts," that plaintiffs only had nine hundred dollars in their hands at the time the attachment was issued and shown the plaintiffs, there was an abundance of property belonging to Blagge & Co. then in New York, and which afterwards came to the city, out of which the defendants could have made their debt. Now their judgment is satisfied, the judgment debtors insolvent, and their property disposed of without the fault of the defendants, but growing out of the mistake of the plaintiffs. Who is to bear the loss? We think it must fall upon the plaintiffs.

The judgment should be affirmed, with costs.

McCUNN, J.—(*dissenting*).—Equity relieves from mistake, except fault be imputable to the party. Anciently, a distinction was drawn between mistakes in law and mistakes in fact; and, while mistakes in fact were always held a sufficient ground of relief, mistakes in law were regarded as necessarily implying blame, on the maxim "*ignorantia legis neminem excusat*." But this distinction, never resting on any solid foundation, and obviously productive of very great injustice, has, in latter times, been mitigated, if not repudiated by the courts, who, governed rather by considerations of substantial right, than by the compulsion of an arbitrary and obsolete dogma, have adjusted their decisions to the equities of each particular instance. In the relation between attorney and client, the former is responsible only for gross error, and is excused, if he mistake on a doubtful point. Why, then, should a layman, who pretends to no technical knowledge of the law, be held to a responsibility from which the men of the profession are exempt? This court dispenses justice on the enlarged and liberal principles of equity jurisprudence; and, wherever it is made apparent that a party will suffer from the consequences of an innocent mistake, I take it we are bound to afford him relief, if it can be done without detriment to the rights of others who have equal claim to the consideration of the court.

Assuming the parties to have equal equities, the question here is, will the defendants be injured by the correction of the mistake in this case?—a mistake about which there is no dispute, and from which, if not repaired, the plaintiffs will suffer loss. The payment to the sheriff, out of which the mistake arose, was not a voluntary payment, but a payment forced by the sheriff, under and by virtue of his attachment. This is clearly shown by the deputy sheriff who made the levy, and is also evidenced by the sheriff's receipt, given to Duncan, Sherman & Co., which exhibits that the payment of the money was made under protest. Now, these circumstances preclude all idea of the moneys being paid voluntarily, or that any mutual mistake was made. Indeed, I look upon the receipt of

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the sheriff as an equitable agreement by the plaintiffs in the attachment, to refund the money, if any mistake should thereafter be discovered.

I am fully sustained in my views in this respect by the case of *De Mesnil v. Dakin*, decided in the Queen's bench, November 25, 1867, Lord Chief Justice COCKBURN delivering the opinion (*Law Rep.*, 3 Q. B., 18).

The rule of law is well settled, that, to prevent money being paid back to the payer, it must appear to be paid with a full knowledge that it ought not to be paid (8 *Cow.*, 195 ; 5 *Sandf.*, 423).

In this case it is conceded, and the court below, in its fifth finding of fact, so holds, that the money was paid by the plaintiffs in mistake, and in ignorance of the fact that there was a mistake. This being so, the court will grant relief from a mistake, unless the party against whom the relief is sought, will sustain injury by correction of the mistake ; which is not the case here.

It is true that the court below finds, in the twelfth finding of fact, that the plaintiffs had, during the life of the attachment, other property of Blagge & Co. in their hands, out of which they realized upwards of \$2,000 ; but this finding is not sustained by any evidence in the case. The only proof on that point, is that of John B. Kitching, a witness for the plaintiffs, who says : "I think it was ten bales of cotton and ten bags of wool," which came to their hands, during the operation of the attachment and before this action was brought ; and the same witness testifies that that shipment was made particularly against a certain specific draft, and could not be appropriated to any other purpose ; and he says that the balance of that shipment, after paying that specific draft, was handed over to the sheriff. Nay, further, he states that all moneys and profits which came into the hands of Blagge & Co. (after paying said specific draft), were paid to the sheriff. Now this is all the evidence in the case, as to property coming into the hands of Duncan, Sherman & Co., during the lifetime of the attachment or execution ; and where the learned

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judge found the proof upon which to base his twelfth finding, I cannot discover.

It is true, as I have said before, property came into the hands of the plaintiffs, during the lives of the execution and attachment; but this property was shipped against certain specific drafts, as I have shown, and could not legally be diverted to any other purpose. "A factor," says Mr. Justice STORY, in his work on "Agency" (§ 368), "is deemed for many purposes the owner of the property, especially where he has demands upon it for advances and debts." The consignment of the property and the advances made thereon by the consignees upon the credit of the consignment, will vest in the consignees the right of property, and the constructive possession also (*Dows v. Greene*, 16 *Barb.*, 72). Mr. Justice MONELL, in the case of *Shuttleworth v. Bruce*, in a very able and learned opinion, states the fact that, where goods are shipped against a certain specific draft, the proceeds cannot be diverted to any other purpose; and such was the doctrine established in this court in the case of *Lowry v. Stewart* (3 *Bosw.*, 605), which case was affirmed in the court of appeals (25 *N. Y.*, 239). The same rule was applied in *Parker v. City of Syracuse* (31 *N. Y.*, 376). Indeed, the authorities are so numerous that they have rendered the principle almost elementary. It is manifest, from the testimony in this case, that the goods of Blagge & Co., which came to the hands of the plaintiffs during the life of the attachment, were intended by the drawer of the draft to meet its payment in the hands of the drawees (the plaintiffs); and that the draft accompanying the bills of lading operated as an assignment for that purpose; and that the goods or the proceeds thereof could not be diverted by the plaintiffs to any object. This being so, then there is no evidence in the case that any property came into the hands of the plaintiffs belonging to Blagge & Co., during the life of the attachment, which could be applied, and which was not applied, to the benefit of the defendants; consequently, they were not injured in any way by the negligence, delay, or laches, of the plaintiffs;

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and will not be affected in any legal rights by a correction of the mistake, of which a remedy is sought in this action.

I think a new trial should be ordered.

Judgment affirmed.

CORNWELL *against* WOOLEY.

Court of Appeals; March, 1867.

WILLS.—LEGACY TO WITNESS.

A legacy to a subscribing witness to a will is not void, under 2 *Rev. Stat.*, 65, § 50, where the will can be proved without the testimony of the witness; as, where such witness is a non-resident of the State, and the testimony of the other subscribing witness can be obtained. *So held*, notwithstanding the legatee witness was examined (though unnecessarily), to prove the execution of the will.

Appeal from a judgment.

This action was brought by the plaintiff, as assignee of Joel Parker, to recover a legacy of \$500, together with one fifty-fourth part of the residuary estate, bequeathed to Parker under the will of the late Isaac M. Wooley, of the city of New York, and amounting to \$1,248. Joel Parker, the legatee and devisee, was one of the witnesses to the will, and at the time of the death of the testator, and ever since, was a resident of the State of New Jersey.

The other witness to the will was examined before the surrogate, and the testimony of Mr. Parker was also taken on the question of the execution of the will.

The defense was based upon the claim that the legacy to Parker, and all his interest under the will, were void,

on the ground that he was a subscribing witness to the will.

The judge at the special term, and the general term of the supreme court in the second district, gave judgment for the plaintiff. The defendant now appealed to the court of appeals.

Mr. Riggs, for the appellants.

Mr. Fuller, for the respondent.

HUNT, J.—The statute upon this subject is as follows : “If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest, or appointment of any real or personal estate, shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, &c., shall be void, so far only as concerns such witness, or any claiming under him ; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made” (2 *Rev. Stat.*, 65, § 50). The provisions of the statute respecting the execution of a will are as follows : “Every last will and testament shall be executed and attested in the following manner : 1. It shall be subscribed by the testator at the end of the will ; 2. Such subscription shall be made in the presence of attesting witnesses, &c. ; 3. The testator shall make certain declarations ; 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator” (2 *Rev. Stat.*, 63, § 40).

There being but two witnesses to the will, including the legatee, it is manifest that his name is indispensable to the due execution thereof.

The statute which regulates the proof of wills, bearing upon the present point, is as follows : “When any one or more of the subscribing witnesses to such will shall be examined, and the other witnesses are dead, or reside out of the State, or are insane, then such proof shall be taken

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of the handwriting of the testator, and of the witness or witnesses so dead, absent, or insane, and of such other circumstances as would be sufficient to prove such will on a trial at law" (2 *Rev. Stat.*, 58, § 13). "If it shall appear on the proof taken, that such will was duly executed; that the testator at the time of executing the same was in all respects competent to devise real estate, and not under restraint, the said will and the proofs and examinations so taken shall be recorded in a book to be provided by the surrogate, and the record thereof shall be signed and certified by him" (§ 14). Other sections provide that the record of the same shall be competent evidence in all the courts of the State.

It has long been the settled law of this State, that the execution of a will may be proved, on a trial at law, by one witness, if he is able to prove its perfect execution (*Jackson v. Vickory*, 1 *Wend.*, 415). It is manifest that it is not indispensable in all cases that both the subscribing witnesses to the execution of a will should appear before the surrogate to establish its execution; as when one of the witnesses is dead, or resides out of the State, or is insane. In such case the will may be established before the surrogate "without the testimony of such witness," and by the testimony of the remaining witness. In the present case, Parker was a non-resident of the State, and was within the exceptions mentioned. If the remaining witness was competent to prove the complete execution of the will, that is, its subscription and acknowledgment by the testator, and its attestation by the two witnesses in his presence, and at his request, the will was sufficiently proven under the statute. No objection was made on this ground, and upon an examination of the evidence of the remaining witness it appears to have been full and complete.

The appellant claims that the expression, "without the testimony of such witness," should not be confined to the bearing witness or giving evidence by such subscribing witness, in the ordinary sense of those words, but was intended to include all evidence that such person was a witness or took any part in the transaction. The expression

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in section 13, which I have quoted, that proof should be taken of the handwriting of the witness, of the testator, and of other circumstances sufficient to prove the will on a trial at law, and the necessary evidence on such trial at law, rebut this idea.

The will could have been proved without the testimony of Parker. The devise to him, does not, therefore, become void, and the present action is well brought. The judgment below should be affirmed.

SCRUGHAM, J.—The plaintiff's assignor, Joel Parker, was one of the witnesses to the will, and resided out of the State at the time it was proved. On the examination before the surrogate, of the other subscribing witness, Robert Keon, he testified to all of the facts necessary to constitute the execution of the will; that the subscription to the will was made by the testator in the presence of the witnesses; that at the time of making it he declared the instrument to be his will; that he requested each of the witnesses to sign it as such; and that each of them so signed it in the presence of the testator. As Mr. Parker resided out of the State, this examination of Mr. Keon having been had, no other testimony was necessary to the proof of the will, except proof of the handwriting of the testator, and of the non-resident witness, Joel Parker (2 *Rev. Stat.*, 58, § 13); and, therefore, as the will could have been proved without the testimony of Joel Parker, the legacy to him is not void (2 *Rev. Stat.*, 65, § 50; *Caw v. Robertson*, 5 *N. Y.* [1 *Seld.*], 125).

The judgment should be affirmed.

Judgment affirmed.

BELL *against* RICHMOND.

Supreme Court, First District; General Term, April, 1868.

EXAMINATION OF PARTIES.—WHEN ORDERED.

As a general rule, an issue must have been joined, before a party to an action can procure an examination of an adverse party.

The case of *McVickar v. Ketchum* (1 *Ante*, 452),—disapproved.

Appeal from an order denying a motion to vacate a summons to the plaintiff to submit to an examination before trial.

The defendant in this action, on March 3, 1868, applied to Mr. Justice INGRAHAM for a summons directed to the plaintiff, Jared W. Bell, requiring him to appear before him on the 16th of March, then instant, "to be examined as a party before trial on behalf of the defendant." Such a summons was issued, and duly served upon the said plaintiff, who appeared, and moved to vacate the summons on the ground that the same was "irregularly issued." Such motion was made upon his affidavit, by which it appeared that no papers or proofs were used on the application for the summons, and that the action was for goods sold and delivered and work and labor,—and that, at the time summons was issued, issue had not been joined. The justice denied the motion, and overruled the plaintiff's objections, and ordered the examination to proceed. From this order this appeal was taken.

Samuel G. Crooks and *H. Y. Cummins*, for the appellants.—I. The application was made under section 391 of the code of procedure,—which provides for the examination of

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a party to an action at the instance of an adverse party "at any time before trial." The clear meaning of the section is that before such an examination shall take place there shall be something "to try" between the parties, *i. e.*, an issue. It was not the intention of the framers of this section to afford through its provisions a means for discovery. Neither was it designed to afford to the party an unlimited examination in form or in substance.

II. It is submitted that even if the examination may be had before issue is joined, at all events some record is necessary upon which to base the summons, *i. e.*, to enable the officer issuing the summons to know that the facts exist authorizing an examination of the party. No facts were presented to the officer in this case on the part of the defendants. It did not even appear that an action had been commenced or was pending in this court.

III. The practice in such cases was settled in this court in 1865 at general term, in the case of Norton v. Abbot (28 How. Pr., 388).

G. A. Scixas, for the respondent.

BY THE COURT.*—CARDOZO, J.—The question presented for our consideration is whether a party can be examined as a witness under section 391 of the Code, before issue joined. I think the issue should be joined before the examination is had, unless a case is made, which is not pretended in this instance, justifying an order for the taking of the testimony *de bene esse*. The only reported decision in which a different view has been taken is *McVickar v. Ketchum* (1 Abb. Pr. N. S., 452), in which the general term of the superior court (Justices MONELL and McCUNN) held that the examination might be had at any time after the action was commenced.

But the question did not really properly arise there, for the plaintiff had been obliged by Justice MONCREIF to put in a verified complaint before he permitted the examination.

* Present, BARNARD, P. J., and INGRAHAM and CARDOZO, JJ.

The theory that the change made in 1863 in section 395 of the code by striking out at the end of the first sentence the words "in relation to matters pertinent to the issue," controls or affects this sentence, is fallacious. That portion of the section stood, before the amendment, thus: "A party examined by an adverse party as in this chapter provided, may be examined on his own behalf, in relation to matters pertinent to the issue." As amended, it reads, "A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses."

The change does not affect this question, for witnesses are always to be examined on matters pertinent to the issue; and the words, "subject to the same rules of examination as other witnesses," covers that and other matters. To have used both phrases would been somewhat tautological. The idea expressed in the first was included in the latter. The omission, therefore, furnishes no ground for the argument that the change was to alter the rule which had previously obtained, and which, in fact, never was based upon that section at all. Indeed, that section does not and never did bear upon the time when the examination should be had, but only enabled a party who had been examined by his adversary to become a witness for himself. At that time, the law did not permit a party to be a witness for himself, but allowed his adversary to call him if he pleased, and the sole purpose of section 395 was to authorize a person called by the opposite party, to be a witness also on his own behalf.

I think there is nothing in section 391 which prevents our requiring that some issue shall exist to try, before the examination which is to be had in lieu of an examination at the trial, shall be allowed; and as no practice has been authoritatively established upon the subject, and as much injustice might be done by permitting a general, unrestricted, roving examination of a party, as it must be, if allowed before the issue is framed, and as there is no necessity for any such rule being adopted, I think we may

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properly hold the true construction of the section to be the one I have given to it.

The order appealed from should be reversed.

STEPHENS *against* DE CONTO.

New York Superior Court ; Special Term, March, 1868.

INJUNCTION.—TRADEMARK OF NEWSPAPER.

The principles upon which equity enjoins a defendant from imitating the plaintiff's trademarks, do not apply to the publication of newspapers, except so far as to protect the proprietors of a paper in the use of the *name* adopted by him for such paper.

If, in an action brought to restrain the publication of defendant's newspaper, upon the ground he is infringing trademarks adopted by the plaintiff in the publication of a newspaper previously established, it appears that the names of the two papers are so far different, that, considering the dissimilarity of type and general appearance, one is not liable to be mistaken for the other, no injunction can be granted.

Trial by the court.

This was an action to obtain an injunction restraining the defendant from editing, issuing or printing a newspaper called the "El Cronista." It was tried before the court without a jury ; the facts on which the injunction prayed was claimed, being as follows :

About fourteen years previous to the commencement of the action a newspaper in the Spanish language was established in the city of New York, under the name of "La Cronica," by one Manuel de Pena ; which obtained a large circulation in all the principal commercial or maritime cities of North and South America. In April, 1865, De Pena died, being indebted at the time to the plaintiff in

the sum of \$1,000, and leaving as assets of his estate the said newspaper and a large amount of material used in its printing. De Pena was a native of Spain, and never became a citizen of the United States. Upon his death his widow took possession of the newspaper and assets, and in July, 1865, formed a partnership with the defendant to continue its publication; and its publication was continued under the same name of "La Cronica," in the same form and description of type, until May, 1866, when a symbol was placed over the title of the paper, and the title printed in a new form and with a new description of type. On May 4th, 1867, the title or name of the newspaper was changed from "La Cronica" to "El Cronista." The symbol placed over the name the previous year was retained, and the name or title printed in new and different type. Under the latter name, and in the latter form, it was being published at the commencement of this action. At different periods of its publication, commencing as far back as 1862, and ending at the time of the trial in January, 1868, the paper was issued of different sizes and of different type.

In April, 1867, the public administrator of the city of New York, in virtue of his office, took possession of the printing material and property connected with the paper, and subsequently sold at public auction the right, title, and interest which De Pena had in his lifetime, in the newspaper called "La Cronica," including the subscription list and good-will thereof, and in the aforesaid printing material and other property connected therewith; at which sale the plaintiff became the purchaser.

It was proved that in 1867, prior to the sale, the newspaper called "La Cronica," was claimed as the joint property of the widow of De Pena and the defendant; but upon the change of name in May of that year from "La Cronica" to "El Cronista," the latter paper became the sole property of the defendant, and was thenceforth edited, printed, and published by him, with new type purchased by himself. It was also proved that the symbol, placed over the name of the paper published by the de-

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fendant and Mrs. De Pena, in May, 1866, was the private symbol, insignia, or emblem of the defendant.

There was no proof that the defendant was in possession of, or was using, any of the printing material or other property alleged to have belonged to De Pena.

T. B. Eldridge, for the plaintiff.

H. H. Morange, for the defendant.

MONELL, J.—No evidence was given or offered on the trial of this action, proving or tending to prove that any portion of the material used in printing the paper called “*La Cronica*,” and claimed to have been purchased by the plaintiff, was in the possession of the defendant at the commencement of the suit. Such property, if it existed, had previously gone into the possession of De Pena’s widow, who claimed it under the Spanish law, as heir-at-law of her husband ; or it was being administered by her as administratrix *de son tort*. In either case she alone could be called to account for it. But there was evidence that the type and material used in printing the paper, the publication of which is sought to be enjoined, was purchased by and belonged to the defendant. So much, therefore, of the plaintiff’s case as demanded an accounting by the defendant for such property, fails, for the want of proof to support it ; and the controversy is, accordingly, reduced to the single question of the right to restrain the future publication, by the defendant, of the paper called “*El Cronista*.”

The plaintiff’s claim to the restraint was founded upon his purchase, at the public administrator’s sale, of the interest of De Pena in the newspaper called “*La Cronica*,” which the plaintiff claimed embraced, not only the type, cases, and presses used in printing, but also the exclusive right to the name and the good-will connected therewith ; and that, therefore, the publication by the defendant of a newspaper bearing the same name, or of any name so similar in its appearance to the eye or in sound to the ear, as

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was calculated to deceive the public into the belief that they were the same, was an invasion and infringement of his proprietary right in the former paper.

It was not disputed that De Pena, at the time of his death, was the sole proprietor of "La Cronica;" nor that the plaintiff acquired all the interest of De Pena in such publication. And it was conceded that Mrs. De Pena and the defendant, under a copartnership agreement, continued the publication of the paper from the period of De Pena's death until May 4, 1867, without any material change, either in the name or in the typographical or general appearance, or in the size and form of the paper. On that day, however, the publication of "La Cronica" ceased, and with its cession, the joint interests of Mrs. De Pena and the defendant in such publication also ceased. Thereupon, and before the public administrator's sale, the publication of "El Cronista" was commenced by the defendant as its editor and sole proprietor.

I need not stop to ascertain what proprietary interest, if any, Mrs. De Pena had in the publication of her deceased husband, nor under what right the publication was continued after his death. She at least was in possession, assuming the right to continue the publication for her own emolument, and was dispossessed, if at all, by an involuntary sale of her husband's interest or property in the paper. What right of property there may be in what is commonly denominated the "good-will," is not fully determined; but such property, whatever it is, has never been protected, except where it has been made the subject of some express covenant between the parties. It may be sold by private agreement, and the stipulations of the parties in respect to it will be enforced; but in the absence of any covenant, and on a purchase at an involuntary sale, the vendee is not subrogated to all the rights of the original owner. This was the view intimated in respect to "copyrights," in *Stephens v. Cady* (14 *How. U. S.*, 528; and see *McCardel v. Peck*, 28 *How. Pr.*, 120). Hence, it would seem to follow, that, whatever the plaintiff may have purchased, he did not acquire such a right of prop-

erty in the name or title of "La Cronica" as would prevent its being assumed afterwards by another person.

If this case was to be determined solely upon whether the similarity, if it could be established there was any, of the names "La Cronica" and "El Cronista," could mislead the public into the belief that they were the same, I should have no difficulty in reaching the conclusion, upon the evidence, that no such effect could or would result. An inspection of the several issues which were produced before me disclosed such marked differences in the size, heading, typographical and general appearance of "La Cronica," as published by De Pena in his lifetime, and the paper of the same name, issued by his widow and the defendant afterwards, that the issues of the later period would not, as I believe, be mistaken for or be regarded as a continuation of the earlier publication. And, independently of the clear difference in the signification of the names of "La Cronica" and "El Cronista,"—the one, according to the testimony of a highly-educated and very intelligent Spanish witness, meaning "the chronicle," and the other "the chronicler," the one "being the thing done, and the other the one that does it,"—there is so manifest a dissimilarity in the general appearance, both as respects the formation of the words and the character of the type employed in printing, that, as the witness before alluded to said, "no Spaniard could be mistaken."

The case, however, in my judgment, is relieved of all difficulty, inasmuch as it clearly appears that upon or prior to the publication of "El Cronista," the publication of "La Cronica" had ceased. For, I think, it cannot be successfully claimed that the one was merged in, or was even a continuation of the other. "La Cronica" was printed with the type and upon the presses of the original proprietor, under a copartnership arrangement between Mrs. De Pena and the defendant; whereas "El Cronista" was the sole property of the defendant, both in the adoption of its name and in the type used in its printing. Unless, therefore, it can be sustained that the proprietorship of a newspaper is so exclusive and comprehensive that its

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rights would be invaded by a publication of another newspaper bearing a different title or name, the defendant's publication cannot be claimed to be an infringement of any of the plaintiff's rights. I do not understand that the protection which the law affords to "trademarks," even assuming the name of a newspaper to be a trademark, goes so far as is claimed in this case. The protection which has been granted to that species of property has never, I believe, been extended over anything that was the subject of a patent or a copyright, but is confined to appropriations of names designating some particular manufacture or business. There can be no such property in a newspaper, except, perhaps, in the name or title of the paper, which is the only continuing portion of it. The contents of each issue are the composition or creation of the editor or contributors, are varied each day, and when given to the public, all literary proprietorship in them is lost. And the law of trademarks, like the law of copyright, cannot be applied to a work of so fluctuating and fugitive a character (*Clayton v. Stone*, 2 *Paine*, 392).

I do not mean to say that a newspaper proprietor can not appropriate, and, by long use, acquire a property in a name, which the courts will protect against piracy. In this respect the analogy of the rules of trademarks would apply (*Dayton v. Wilkes*, 17 *How. Pr.*, 510). And I have no doubt that the names, so long appropriated and used, of "*The New York Herald*," or "*The Sun*," would be protected as trademarks, against the assumption of those names by another proprietor. But that I understand to be the extent of the rule, and that any mere assimilation of the name—unless it was very clearly calculated to deceive the public—would not be unlawful.

There was not sufficient evidence on this trial that the public had been deceived. The plaintiff's evidence, and that of his only witness, was of too general a character to establish so important a fact. Besides, it was more than balanced by the evidence on the part of the defendant, before alluded to, that the names of the two papers were so dissimilar in signification, that no one acquainted with

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the Spanish language could be decoyed into purchasing the one for the other. And the inspection which I have given of the several papers which were made exhibits before me, has confirmed me in the same belief.

Upon the whole case, therefore, I am of opinion that the defendant is entitled to judgment dissolving the injunction, and dismissing the complaint with costs.

COSTAR *against* PETERS.

New York Superior Court; General Term, April, 1868.

REVERSAL OF JUDGMENT.—RESTITUTION.

Where judgment for the plaintiff, in an action of ejectment, is reversed, and a new trial ordered, restitution to the plaintiff of the premises in question will be ordered, as of course; but without prejudice to the rights, if any, of a purchaser *pendente lite*.

Motion to amend an order reversing a judgment.

This was an action of ejectment brought to recover possession of a vault under the sidewalk of Mercer-street. On the first trial, the plaintiff had a verdict, on which judgment was entered and execution issued, and the plaintiff was put in possession of the vault.

The general term, on appeal, reversed the judgment, and ordered a new trial.

The defendant now moved for an order amending the order of reversal so that it should direct restitution to him of the vault in question.

Notice of the motion was served on B. F. Beekman, who had purchased from the plaintiff pending the suit.

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Everett P. Wheeler, for the motion ;—cited *Chamberlain v. Choles*, 3 *Abb. Pr. N. S.*, 118 ; *Code*, § 330 ; 2 *Rev. Stat.*, 339, § 3.

J. F. Choate, in opposition ;—cited *Young v. Brush*, 18 *Abb. Pr.*, 171, 181 ; *Fitz Allen v. Lee*, 2 *Dall.*, 205.

Ira D. Warren, for Mr. Beekman ;—cited *Code*, § 132.

BY THE COURT.*—ROBERTSON, C. J.—This is an application for an amendment of the judgment of reversal in this case, by adding thereto an award of restitution to the defendant of the premises which are the subject of controversy in it, and of which the plaintiff obtained possession under an execution on the reversed judgment. Section 330 of the code of procedure is not imperative, the word used being “may,” not “shall,” and leaves the matter open for the exercise of discretion by the court. As there is, possibly, no ground for exercising discretion where a judgment of reversal is absolute, and no new rights have been acquired, in such case, restitution will be ordered as a matter of course (*Estus v. Baldwin*, 9 *How. Pr.*, 80, per WELLES, J.).

It does not seem to be settled, that merely because judgment of reversal embraces an order for a new trial, restitution will be refused (*Britton v. Phelps*, 24 *How. Pr.*, 111). As such judgment replaces the action in the condition it was before trial it would seem that an appellant ought not to lose the rights of which he had been deprived by an erroneous judgment. He loses possession of the subject-matter of the action during the appeal, where he has not obtained a stay of proceedings, which ought to be sufficient punishment or calamity for his fault or misfortune in not giving security and obtaining a stay.

Where the rights of third parties have intervened, who have been misled by the appearance of things which has been the result of such omission to procure a stay, the

* Present, ROBERTSON, C. J., and MONELL and McCUNN, JJ.

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court ought not to permit them to be prejudiced by an order for restitution, any more than on a sale of land to a third person on execution upon a judgment which is afterwards reversed. Of course, there is no room for a defendant to file a notice of *lis pendens*, when he seeks no affirmative relief. His present right of restitution arises from something occurring after the commencement of the action.

An affidavit of Mr. B. F. Beekman, a purchaser of the premises 537, 539, and 541 Broadway, read upon this motion, which he opposed, shows that he is now in possession of such premises by his tenants, but says nothing of the vault in Mercer-street in front of them, which is the subject of controversy. He does not deny therein actual notice of this action, or claim to be a *bona fide* purchaser of the premises and vault. An affidavit of the attorney for the plaintiff shows that shortly after the latter was put in possession of such vault under the judgment reversed in this action, he conveyed the adjacent premises to a purchaser, but described them as bounded westerly "by the easterly side of Mercer-street," which would exclude such vault; of which, however, such purchaser forthwith entered into the possession, and he and his grantees have so remained therein until the present time. And the plaintiff has never since been in possession of it. Such abandonment of the possession might relieve the plaintiff from all necessity of surrendering it, but could not affect the defendant's right to enter into it. The affidavit of the present owner (Beekman) is not sufficient to show that he ought not to be left to his remedy, if entitled to any, by an original application to the court, showing his good faith and want of notice, in order to prevent his removal and that of his tenants.

The judgment of reversal, therefore, heretofore entered may be amended, by adding thereto an order restoring the defendant to all things which he has lost by means or in consequence of the judgment reversed, as against the plaintiff and those claiming under him, without prejudice to the right of the purchaser Beekman to set up any de-

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fense he may have to a writ of assistance, or any other mode adopted for his removal from such premises.

Order accordingly.

LOBDELL *against* LOBDELL.

Court of Appeals ; March, 1867.

SPECIFIC PERFORMANCE.—VALIDITY OF CONTRACT.—
TESTIMONY.

One who has agreed by parol to convey specified lands to another, if the latter will make specified improvements upon them, may be decreed to make specific performance of the agreement, upon his part, when the required improvements have been made by the plaintiff.

The promise to make improvements involves loss to the party making them, and is a valuable consideration sufficient to sustain the promise to convey. A provision of a statute prohibiting a party to an action from testifying as a witness to any transaction had *personally* by him with a person since deceased, does not exclude such party from testifying to the particulars of a transaction which took place between the deceased and a third person, in the presence of the witness.

Appeal from a judgment.

The facts are stated in the opinion.

H. Boies, for the appellants ;—contended, among other points, that there was no evidence to sustain the finding of the referee as to the terms of the contract alleged ; and that a court of equity cannot decree the specific performance of a parol contract for the conveyance of land where the evidence presents a fair question of doubt as to whether the contract sought to be enforced was or was not made (*German v. Machin*, 6 *Paige*, 288 ; *Phillips v. Thompson*,

1 *Johns. Ch.*, 131; *Story Eq. Jur.*, §§ 755-769; *Willard Eq. Pr.*, § 282).

Geo. W. Cotteran, for the respondent.—I. A parol agreement for the conveyance of lands, although void at law, may be enforced in equity, and a proper conveyance may be decreed, where the agreement has been performed by the party seeking relief (*Malins v. Brown*, 4 *N. Y.* [4 *Comst.*], 403; *Williston v. Williston*, 41 *Barb.*, 635; *McCray v. McCray*, 30 *Barb.*, 633; *Surcombe v. Pinninger*, 17 *Eng. L. & Eq.*, 212; *Traphagan v. Traphagan*, 40 *Barb.*, 537; *Wetmore v. White*, 2 *Cal. Cas.*, 109; 2 *Story Eq. Jur.*, § 761; *Parkhurst v. Van Cortland*, 14 *Johns.*, 15; *Morphet v. Jones*, 1 *Swanst. Ch.*, 181; *Dygert v. Remersnyder*, 32 *N. Y.*, 629; *Lowry v. Ten*, 3 *Barb. Ch.*, 407; *Jer. Eq.*, 436, 456; *Newton v. Swassey*, 8 *N. H.*, 9; *Eaton v. Whitaker*, 18 *Conn.*, 322; *Caldwell v. Carrington*, 9 *Pet.*, 86; *Dugan v. Gittings*, 3 *Gill*, 138; *Hall v. Hall*, 1 *Id.*, 383; *Moreland v. Lemasters*, 4 *Blatchf.*, 383; *Id.*, 94; *Byrd v. Odem*, 9 *Ala.*, 756, 764; *Finucane v. Kearney*, 1 *Freem.*, 65, 69; *Simmons v. Hill*, 4 *Harr. & McH.*, 252; *Thornton v. Henry*, 2 *Scamm.*, 49; *Shirly v. Spencer*, 4 *Gilm.*, 583, 560; *Allen's Estate*, 1 *Watts & S.*, 383; *Hare & W. Lead. Cas. Eq.*, 507, 557, 569.

II. The agreement here found by the referee possesses all the elements of a valid contract. Had it been reduced to writing it would have sustained an action at law. It was not a gift, but an *agreement to convey*, founded upon a valuable consideration. Upon performance by the purchaser, the land, in equity, became his; the vendor simply holding it as trustee (*Jer. Eq.*, 446; *Buckmaster v. Harrop, Ves. Jr.*, 456, 472; *Pollexfen v. Moore*, 3 *Atk.*, 272). The consideration was neither inequitable nor inadequate (3 *Pars. Contr.*, 359; *Sheppard v. Bevin*, 9 *Gill*, 32; *Crosbie v. McDonnell*, 13 *Ves. Jr.*, 148; *Rerick v. Kern*, 14 *Serg. & R.*, 271; *King v. Thompson*, 9 *Pet.*, 204; *Syler v. Eckert*, 1 *Binn.*, 378; *McClure v. McClure*, 1 *Barr.*, 374).

PARKER, J.—This action is brought to compel a specific performance of an alleged parol agreement between the

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plaintiff's father and the defendant's father, by which the former agreed to convey to the latter a piece of land.

The complaint states the agreement as follows:—
“That on or about the 1st day of November, 1846, Pliny Lobdell, for a good and valuable consideration, paid by Seymour Lobdell to said Pliny, sold, and, by parol, conveyed to said Lobdell all that certain piece or parcel of land,” describing it by metes and bounds, “containing about fourteen acres of land, more or less; and at the same time said Pliny Lobdell yielded and gave up to said Seymour Lobdell the full and complete possession of said lands and premises, and agreed to and with said Seymour Lobdell to execute and deliver to him or his heirs a good and sufficient deed of conveyance thereof, in writing, at any time, on request.” It then sets forth that, in pursuance of such sale and conveyance, and relying upon the same, and upon the said promise to convey by a good and sufficient deed, the said Seymour, with the knowledge and consent of said Pliny, took and entered into possession of the whole of said lands, and cleared up a large portion thereof, and tilled, cultivated, and used the same, as his own, continuously, until his death; and while thus in possession, expended considerable sums of money in making substantial improvements and erecting valuable buildings thereon, with the knowledge and approbation of said Pliny. The answer denies the alleged sale and agreement to convey, and the payment of any valuable consideration, and avers that the occupation of said Seymour was by the permission of the said Pliny, who was his father, as tenant at will, and that such was at all times the understanding of the parties in respect to it.

The case was tried before a referee, who found and reported that, in November, 1846, the said Pliny Lobdell made a verbal agreement with said Seymour Lobdell, that if the said Seymour would take possession of and clear up, and reduce to cultivation, and make improvements upon about fifteen acres, parcel of a piece of wild land owned by said Pliny, the said fifteen acres should become the property of said Seymour, and that he, the said Pliny,

would convey the same to him by a sufficient deed of conveyance for that purpose ; and that the said Seymour took possession of said fifteen acres under said agreement, built a log house thereon with Pliny's assistance, moved his family into the house, and commenced to clear up the land, and built a barn on it ; and in 1852 erected on it a framed dwelling-house, into which he moved his family, and where he continued to reside until his death, in May, 1864. That, while so residing on the premises, he cleared all of said fifteen acres but about three acres, farmed it, reduced it to cultivation, raised crops upon it, and had the entire management, use, and enjoyment of it as his own property. That the said Pliny and Seymour built a line fence between it and the residue of the lot, on which residue Pliny cleared up to the line fence on one side, and Seymour cleared up to it on the other ; the said Pliny having built upon the said residue, where he lived for the last ten or twelve years of his life, and died in November, 1864.

As a conclusion of law, the referee found that the plaintiffs were entitled to judgment against these defendants, who bring this appeal, that they convey the said fifteen acres to the plaintiffs.

The general term affirmed the judgment entered upon the report of the referee, and the defendants, who are decreed to convey, appeal to this court.

No question is raised but that the contract, if made as found by the referee, was taken out of the statute of frauds, by the part performance ; but the defendants' counsel insist that the contract found is not sustained by any evidence ; that, at all events, it is not so clearly and satisfactorily proved as to make out a case for specific performance ; that the failure to prove the contract set up in the complaint should have produced a dismissal of the complaint ; that the promise found was without valuable consideration ; that the conditions were not fully performed by the promisees, and that the fifteen acres given to the plaintiffs were more than they are entitled to.

It is impossible to maintain that there is no evidence to

support the findings of the referee. The testimony of Nancy Lobdell, the widow of Pliny, that her husband told his two sons, Seymour and Ammon, that they might have fourteen acres apiece, to go on to, and do the work as he did, and, as long as they did as he wanted them to, they might stay on it; that they should clear it up in farm-like style, and should not run over it, and (as stated on her cross examination) that, if they would go down on to this lot, and cultivate it, the land should, some time, be theirs;—together with the facts that they did go down and each take possession of the piece assigned him; that when, some six months afterward, they came and asked him for deeds, or writings on his part which would entitle them to the land, he refused, on the ground that his *word* was as good as a writing; that Seymour did clear, cultivate, and build on the piece assigned to him; that the father assisted in making the line fence, cutting it off from his other land, and recognized to various witnesses Seymour's right to control it, and told the witness, Oliver Pierce, after Seymour's death, that he meant to have deeded it to Seymour before he died, are surely some evidence in support of the finding of the referee, as to the agreement and its terms.

Whether the court would have come to the same conclusion as the referee did, in regard to the contract, upon the whole evidence, we are not to inquire. In an action for specific performance, as in other actions, the questions of fact, upon conflicting evidence, are for the court below, and not for this court, except in the case provided for in section 268 of the code.

The rule which courts of equity have adopted in suits for the specific performance of contracts requires that the contract be established by competent and satisfactory proof; by proof which is definite and certain; for the reason, as Judge STORY expresses it, that a court of equity "ought not to act upon conjectures;" and if the proof should end in leaving the contract uncertain, so that the court cannot say what its precise import and limitations are, a decree for a specific performance will be withheld (1 *Story Eq.*

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Jur., §§ 764, 767). All this depends upon the evidence; and if evidence is given in the court below, tending to the establishment of such a contract, the sufficiency of the proof to satisfy the mind of the court as to the existence of the contract, with the requisite degree of clearness and certainty, is not a matter for this court to consider.

The variance between the contract set up in the complaint, and that found by the referee, is not such as to require a dismissal of the complaint. Even under the former practice of the court of chancery, no such iron rule existed, but a variance might have led to an amendment of the bill rather than its dismissal (*Harris v. Knickerbacker*, 5 *Wend.*, 638); or the court would sometimes decree a specific performance in favor of the plaintiff, notwithstanding he failed to make out the case stated in his bill (1 *Story Eq. Jur.*, § 770; *Mortimer v. Orchard*, 2 *Ves. Jr.*, 243). The rule of practice established by the code in regard to variances, however, whatever was the former rule, must now prevail in cases of this kind, as well as others. The difference between the terms of the contract, as alleged, and those proved in this case, was a mere variance, and was properly disregarded (*Code*, §§ 169-171).

The promise to convey, as found by the referee, was not a mere voluntary one, but was made upon a *valuable* consideration, emanating from a loss or disadvantage to the promisee. Pliny said to Seymour, "If you will bestow certain work and labor on this piece of land, I will convey it to you." It cannot be doubted that if, after Seymour had done the work, Pliny had refused to convey, an action at law would lie for the breach of the contract. The consideration is sufficient to support the promise. A court of equity does not require more, in this respect, than a court of law, except that it will look at the consideration, with reference to its adequacy, in order to ascertain whether the inadequacy is so great as to show the contract fraudulent or unconscionable, in which case it will refuse its aid, and leave the complainant to his action at law (*Seymour v. Delancy*, 3 *Cow.*, 445). On the other hand, "if the promisee, on the faith of the promise, does some

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act, or enters into some engagement which the promise justified, and which a breach of the promise would make very injurious to him, equity might regard this as confirming and establishing the promise, in much the same way as a consideration for it would" (3 *Pars. Cont.*, 369 ; *Crosbie v. McDoual*, 13 *Ves.*, 148). In *Shepperd v. Bevin* (9 *Gill*, 32) it was held that money expended in improvement of land by a son, on the faith of an agreement of his parent to convey the land to him, constituted a consideration for which specific performance might be decreed against the heirs of the parent. The case at bar is stronger than that. The consideration is valuable, and there is no inadequacy, and the decreeing of a specific performance of the contract does not involve hardship or injustice against the defendants, while the denial of such a decree would operate as a fraud upon the plaintiffs. Their ancestor, under whom they claim, executed his part of the agreement in the confidence that the other party would do the same. To permit such other party or his heirs now to withdraw from the performance of the contract, would aid a manifest fraud against the plaintiffs (*Parkhurst v. Van Cortlandt*, 1 *Johns. Ch.*, 284 ; *Malins v. Brown*, 4 *N. Y.* [4 *Comst.*], 403 ; 1 *Story Eq. Jur.*, § 759).

The performance of the agreement by Seymour Lobdell, as found by the referee, is, I think, sufficient to entitle the plaintiffs to the conveyance. There is no defect of performance, unless in the fact that about three acres of the fifteen remained uncleared. The contract, as found, was that Seymour should "take possession of, clear up, and reduce to cultivation, and make improvements upon a part of said piece of wild land containing fifteen acres." All this he did, with the exception above mentioned ; and this, I think, may well be deemed a substantial fulfillment of the contract on his part, especially as the referee also finds that the father, at various times, while Seymour lived on the premises, assumed to direct him as to the clearing of the same, and that Seymour regarded his directions as binding on him, and obeyed the same.

In regard to the quantity of land contained in the piece

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fenced off for Seymour by the line fence built by him and his father, the referee also found that, although the exact quantity lying south of the fence was not distinctly proved, yet the parties spoke of it, treated and supposed it to be fifteen acres. The conclusion of law that the said Seymour Lobdell, at his death, was justly and equitably entitled to a deed of conveyance in fee of said fifteen acres of land from said Pliny, and the direction for judgment for a conveyance to the plaintiffs of said fifteen acres of land, does not give them any land north of the said division fence ; and if the plaintiffs, in their judgment, have so described the land as to include land north of such fence, the defendants' remedy for such wrong is not to be had upon this appeal, but by application to the court below, to correct the judgment in that respect.

Upon the trial Ammon Lobdell and George Lobdell, the defendants against whom the decree to convey was made, were sworn as witnesses, and each was sought to be examined in his own behalf, in respect to the arrangement made by Pliny Lobdell, their father, and Seymour Lobdell, in their presence, under which Seymour went into possession of the land in question ; which was objected to by the plaintiffs, on the ground that the witnesses were not competent, under section 399 of the code, to testify to such transaction. The objection was sustained, and the defendants excepted. Section 399 of the code, as it stood at the time of the trial, authorized parties to be witnesses in their own behalf, in the same manner as other witnesses, "provided, however, that the assignor of a thing in action shall not be examined in behalf of said party, nor shall a party to an action be examined in his own behalf, in respect to any transaction or communication had personally by said assignor, or said party, respectively, with a deceased person, against parties who are the executors, administrators, heirs-at-law, next of kin, or assignees of such deceased person," &c. In this case a party to the action sought to be examined in his own behalf. So far, he had a right to testify. And it was against parties who were the heirs-at-law of a deceased person. This was not suffi-

cient to exclude him, unless the subject-matter of his testimony was a transaction or communication had personally by him with such deceased person. Now, the transaction or communication respecting which he sought to testify was not between himself and the deceased person, or, in the explicit language of the statute, "had personally by said party with a deceased person," but was between the deceased person and a third person. I am unable to see why he was not a competent witness to that transaction, or how, without extending the limitation further than the statute has done, he could be excluded. Although it may be said that a party standing in the relation in which he does ought to have been excluded, for he has the same advantage over the plaintiffs as a witness as his father would have had, if living and standing as defendant in the suit, still, unless the section, as it stood, can be construed so as to exclude him, the legislature, and not the court, must rectify the omission. It will not suffice to say the case is within the spirit of the enactment, unless a fair construction of the language used will bring it within the enactment itself. The subject of the section is, the allowance of parties to be witnesses in their own behalf, and its object is to provide generally for their examination as such witnesses, and the specific exceptions to such examination. The legislature having undertaken to specify the exceptions, the courts cannot allow any that are not specified by the legislature. When the legislature expressly limited the exclusion of a party to cases in which he should offer to testify in respect to a transaction or communication had personally by him with the deceased person, it is impossible to construe that exclusion as meaning to cover transactions or communications had by some third person, whoever he may be, and however connected with the party offering to testify, with the deceased person. Such construction would ignore the terms "had personally by him," which serve to show the precise extent of the exclusion. The testimony of these parties which was excluded was upon a vital point in the case, the proof in regard to which was conflicting. We cannot say but that it would have

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over-balanced all the evidence of a contract to convey, and have satisfied the referee that none had been made. The error of their exclusion, if it was one, as I think it was, is, therefore, ground for a reversal of the judgment, and for granting a new trial.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

Judgment reversed, &c.

AARON *against* BAUM.

New York Superior Court; Special Term, March, 1868.

INJUNCTION.—PARTIES.

An injunction to restrain the prosecution of summary proceedings to dispossess a tenant, can only be granted in favor of the tenant, or of some one who is a party to the proceedings to be enjoined.

Such injunction will not be granted to one not a party to the summary proceedings, merely because his rightful possession is to be disturbed.

Trial by the court.

This action was brought to obtain an injunction restraining the prosecution of summary proceedings by a landlord against a tenant. The proceedings against which the injunction was sought were instituted before the city judge, by the defendants in the present action, Mayer Baum, and another, claiming to be landlords of the premises in question, No. 30 Oliver-street, in the City of New York, against one Levi Aaron as tenant. Pending the proceedings the present plaintiff, Paulina Aaron, commenced this action against the defendants, praying for an injunction restraining the further prosecution of the pro-

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ceeding to dispossess Levi ; and a temporary injunction was granted.

On the trial of the present action it appeared that the plaintiff and one Henzler were lessees of the premises under a former owner, and were in possession, claiming under such lease. When the defendants purchased the premises, they found the lease to the plaintiff and Henzler on record ; and being informed that Levi Aaron was the lessee, they delivered to him a new lease. The plaintiff was not a party to the summary proceedings ; which were against Levi Aaron.

S. Hirsch, for the plaintiff.

J. Henderson, for the defendants.

MONELL, J.—I am warranted by the evidence in this case in finding all the facts necessary to establish that the plaintiff is entitled to hold the possession of the premises in question under the lease from Rauth to Aaron & Henzler. I am satisfied that such lease has never, in fact or by operation of law, been canceled or surrendered ; and that therefore the plaintiff's holding under it cannot lawfully be disturbed in or by any proceeding to recover the possession of the premises, instituted by the defendants against her husband, or in any proceeding to which she is not a party.

I have found that the lease from Rauth was to the plaintiff and Henzler, and that the plaintiff now holds under such lease. The weight of the evidence is that she and Henzler were partners, and her husband was merely her agent in and about her business of a weiss brewery ; that he had no authority, express or implied, to cancel or surrender the lease ; that it never was canceled or surrendered ; but was in existence at the trial of this action, and that the plaintiff holds the possession of the premises under it.

The defendants, who purchased the reversion after the lease was recorded, took title subject to such lease ; hence the lease to Levi Aaron, the plaintiff's husband, was inoperative to defeat the plaintiff's right to the possession.

Nor is the plaintiff estopped from asserting her title by anything which occurred between Levi Aaron and the defendants. He had no express or implied authority to cancel the lease or surrender the possession of the premises, or do any act or thing which would operate as an estoppel upon the plaintiff. It follows from these facts, that the plaintiff has a clear and undoubted right to the possession of the premises, and that any disturbance of such possession, either of herself or of her tenants, by or under the summary proceedings instituted against Levi Aaron, would be an unwarrantable trespass.

But with all this right on the plaintiff's side, I have not been able to find any sufficient ground to authorize the continuance of the injunction.

The interposition of a court of equity to restrain summary proceedings has never, that I am aware of, been invoked, except by a tenant or other party to the proceeding, and then only on the ground of fraud or surprise, or of some equitable title that could not be set up at law (*Duigan v. Hogan*, 1 *Bosw.*, 645). I do not know of a case, nor can I conceive of one, where a stranger, *i.e.* one not a party to the proceeding, can obtain an injunction merely upon the allegation that he is in danger of having his possession disturbed. His notice of the institution of the proceeding is not of any consequence. He has no right to appear, nor can he make any defense; but that of itself is not enough to warrant an injunction. I do not see, therefore, that the plaintiff occupies any different or worse position, than any person who is in danger of having a trespass committed upon his property or rights; and for such she has adequate remedies at law.

If, upon the dissolution of the injunction, a warrant should be issued, and upon its execution the plaintiff should be removed from her possession, the courts will afford her all the redress she may be entitled to, but the threatened injury is not of that irreparable nature that requires an injunction to restrain its commission.

There must be judgment dissolving the injunction and dismissing the complaint, but without costs.

FITZGERROLD *against* THE PEOPLE.*Court of Appeals ; January, 1868.*

CONVICTION FOR MURDER.—INDICTMENT AND VERDICT.

An indictment which alleges that the prisoner "willfully, maliciously, and of malice aforethought," shot the deceased, inflicting a wound from which the deceased died, is sufficient, as respects the averment of intent, to amount to a charge of murder in the first degree.

A general verdict of guilty, under such an indictment, will sustain a sentence of death.

History and construction of the statutes of New York defining the crime of murder.

The case of *People v. Enoch*, 13 *Wend.*, 159, approved and followed.

Form of an indictment for murder by shooting.

Writ of error to the supreme court of the second district.

Thomas Fitzgerrold, the plaintiff in error, was tried in Westchester county, for the murder of Ellen Hicks.

The body of the indictment was in the following words :

"The jurors of the people of the State of New York, in and for the body of the county of Westchester, upon their oath and affirmation, do present : That Thomas Fitzgerrold, Michael J. Cauty, John Doran, Michael Martin, John C. Burke, and Charles Burke, late of the town of West Chester, in the county of Westchester aforesaid, on the second day of August, in the year of our Lord one thousand eight hundred and sixty-six, with force and arms, at the town of West Chester aforesaid, at the county aforesaid, in and upon one Ellen Hicks, in the peace of God and of the said people then and there being, feloniously, willfully, and of malice aforethought, did make an assault ; and that the said Thomas Fitzgerrold, a certain gun

(called a musket), of the value of ten dollars, then and there charged with gunpowder and a leaden bullet, which gun he, the said Thomas Fitzgerrold, in both his hands there had and held, at and against the said Ellen Hicks, then and there feloniously, willfully, and of his malice aforethought, did shoot off and discharge; and that the said Thomas Fitzgerrold, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun, so loaded, to and against the said Ellen Hicks, aforesaid, did then and there feloniously, willfully, and of his malice aforethought, strike, penetrate, and wound the said Ellen Hicks in and upon the body of the said Ellen Hicks, near the navel, giving to her, the said Ellen Hicks, then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded to and against the said Ellen Hicks, and by such striking, penetrating and wounding the said Ellen Hicks as aforesaid, one mortal wound in and through the body of her, the said Ellen Hicks; of which said mortal wound the said Ellen Hicks did then and there soon after die.

“And the jurors aforesaid, on their oath and affirmation aforesaid, do further present that the said Michael J. Canty, John Doran, Michael Martin, John C. Burke, and Charles Burke, then and there, feloniously, willfully, and of malice aforethought, were present, aiding, helping, abetting, comforting, assisting, and maintaining the said Thomas Fitzgerrold in the felony and murder aforesaid, in manner and form aforesaid to do and commit.

“And the jurors aforesaid, upon their oath and affirmation aforesaid, do say that the said Thomas Fitzgerrold, her, the said Ellen Hicks, in the manner and by the means aforesaid, feloniously, and of his malice aforethought, did kill and murder; and that the said Michael J. Canty, John Doran, Michael Martin, John C. Burke, and Charles Burke, then and there, feloniously, willfully and of malice aforethought, were present, aiding, helping, abetting, comforting, assisting and maintaining the said Thomas Fitzgerrold in the felony and murder aforesaid, contrary to the form of the statute in such case made

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and provided, and against the peace of the people of the State of New York and their dignity.”

The jury found a general verdict of guilty ; and the court pronounced sentence of death.

The prisoner sued out a writ of error to the supreme court of the second district, by which the conviction was affirmed. He now brought error from this judgment of affirmation, to the court of appeals.

Francis Larkin, for the plaintiff in error.

John J. Bates, for the defendants in error.

HUNT, Ch. J.—The prisoner alleges that the indictment charges only the crime of murder in the second degree. It does not allege that the killing was from a premeditated design to effect the death of any human being, nor that it was perpetrated by an act imminently dangerous to others, evincing a depraved mind regardless of human life, nor that it was perpetrated in committing the crime of arson in the first degree. The killing is charged to have been by “willfully, maliciously and of malice aforethought” shooting the said Ellen Hicks upon her body, and inflicting upon her a wound from which she speedily died. This, the prisoner insists, is a charge of murder in the second degree only, and that the sentence and judgment, rendered upon a general verdict of guilty, are erroneous.

The killing of any human being, without the authority of law, is declared by the Revised Statutes (omitting the distinctions in reference to manslaughter and excusable or justifiable homicide), to be “murder” in the following cases :

1. When perpetrated from a premeditated design to effect the death of the person killed or of any human being ;

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of

human life, although without any premeditated design to effect the death of any particular individual ;

3. When perpetrated without any design to effect death, by a person engaged in the commission of a felony (2 *Rev. Stat.*, 657, § 5).

The case of *The People v. Enoch* arose soon after the passage of these statutes (13 *Wend.*, 159). Enoch was indicted for murder upon a charge that on, etc., he did with force and arms, "feloniously, willfully, and of his malice aforethought," shoot and kill his wife, Nancy Enoch. He was convicted and sentenced to be hung. Upon a writ of error brought, it was insisted by his counsel that the verdict and sentence could not be upheld, because a common law indictment "with malice aforethought," could be sustained by proof of killing, without a design to effect death, if such death happened in the perpetration of a crime or misdemeanor not amounting to felony, whereas, by the revised statutes, such an offense did not amount to murder (2 *Rev. Stat.*, 657, § 6). The judgment was affirmed by the late supreme court, and, upon appeal to the court of errors, was affirmed by that court also. The supreme court say that the first subdivision was intended to define murder in the case of express malice, and the second and third subdivisions in cases of implied malice. Judge NELSON (p. 165) uses this language : "Malice aforethought, in common parlance, and as originally used, conveyed only the idea of express malice. Its meaning had been enlarged, so as to include implied malice, by judicial construction ; to define and limit which was the object, and has been the only effect of the fifth section above referred to. It was said on the argument that under this indictment, the jury might have convicted the prisoner upon proof of implied malice, which, since the revised statutes, would only amount to manslaughter, but which evidence would sustain the terms of the indictment "malice aforethought," and justify a conviction of murder from implied malice at common law. So it might have been said before those statutes on a conviction of murder upon a similar indictment, that the jury

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might have convicted the prisoner upon proof, which did not amount to murder, but only to manslaughter, as evidence of the latter offense was admissible under it. * * The answer to all this is, that it is the business and duty of the court to see that a proper direction be given to the jury in point of law upon the evidence, and if either court or jury err, the appropriate remedy must be sought." He proceeds: "The statute has not altered the common law. The offense of murder, as defined in the revised statutes, was so before the statute, and is but the adoption or introduction into the act of the common law definition of the crime. Section 16 limits the offense to the cases mentioned in section 5, above cited, or in other words, abolishes the offense at common law except in those cases, and they are left as before existing in our criminal code. The cases of murder from implied malice have been limited by the second and third subdivisions of the fifth section, but those there defined existed before. The crime of murder might have been committed before the revised statutes, from implied malice, where the prisoner, while engaged in an unlawful act under the degree of felony, such as a riot or other misdemeanor, killed another against his intention. By the third subdivision, such unlawful act must now be of the degree of felony. This is the only modification of the law of murder. The rule that the indictment should bring the offense within the words of the statute declaring it, is applicable only in its strict terms to cases where the offense is created by statute, or where the punishment has been increased, and the pleader seeks to bring the prisoner within the enhanced punishment."

In the court of errors (at p. 173, *et seq.*) the chancellor reiterates these views at length, and concludes by saying: "From this examination of the subject I have arrived at the conclusion that a common law indictment for murder is proper under the provisions of the revised statutes, and a defendant cannot be convicted on such an indictment of a felonious homicide with malice aforethought, unless the evidence is such as to bring the case within the

statutory definition of murder" (p. 176). In *People v. White* (24 *Wend.*, 520) the late court of errors held that when an indictment charged the killing to be felonously, willfully, of malice aforethought, and from a premeditated design to effect death, that the premeditated design or express malice must be proved, but affirm and approve the case of *Enoch*. In *People v. Clark*, decided in this court in 1852 (7 *N. Y.* [3 *Seld.*], 385, 393), JOHNSON, J., uses this language: "The words premeditated, aforethought, and prepenze, possess etymologically the same meaning; they are, in truth, the Latin and Saxon synonyms expressing a single idea, and possess in law precisely the same force. The statute, so far as this term is concerned, has not altered the law. Malice prepenze, however, had attained a broader meaning than belongs to the term premeditated design. The intent to take life was not necessary to constitute malice prepenze. Even express malice, or malice in fact, is defined to be a deliberate intention of doing *any* bodily harm to another, unauthorized by law (*Hale's P. C.*, 451), and by no means necessarily involved an intent to take life. * * The degree of deliberation is not different from that required by the common law. * * It is enough that the intention precedes the act, although that follows instantly."

In 1862 (*Laws of 1862*, 369, ch. 197), the law on the subject of murder was re-enacted, and was altered in its third subdivision. By the revised statutes, as already quoted, it was provided that the killing should be murder in the cases specified, of which the last was as follows: "3. When perpetrated without any design to effect death, by a person engaged in the commission of a felony." By the statute as altered it was made to read as follows: "3. When perpetrated in committing the crime of arson in the first degree. Such killing, unless it be murder in the first degree or manslaughter, or excusable or justifiable homicide as hereinafter provided, or when perpetrated without any design to effect death, by a person engaged in the commission of any felony, shall be murder in the second degree." By this amendment, a killing when perpetrated

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in committing the crime of arson in the first degree, still constitutes the offense of murder in the first degree. When, however, the killing was perpetrated without any design to effect death by a person engaged in the commission of a felony, other than that of arson in the first degree, it was murder in the second degree only. This was the entire effect of the amendment of 1862. This section is obscure, and has been generally read as if the words "or when perpetrated without any design to affect death by a person engaged in the commission of any felony," formed an exception, like the words, "or manslaughter" or "justifiable homicide." Upon this construction no crime of murder in the second degree is created. The very crime intended to be thereby created, is by this construction declared not to be such crime. A more reasonable construction should be put upon the language, and effect given to the evident intention of the legislature. The statute may be thus paraphrased: "The killing of a human being shall be murder in the first degree: First, when perpetrated from a premeditated design to effect the death of the person killed or of any human being. Second, when perpetrated by an act imminently dangerous, etc. Third, when perpetrated in committing the crime of arson in the first degree. Such killing unless it be murder, or manslaughter, or excusable or justifiable homicide as hereinafter provided, shall be murder in the second degree, when perpetrated without a design to effect death, by a person engaged in the commission of any felony." This was the evident intent of the framers of the statute, and in my judgment a justifiable construction of the language. Or again, it may be read thus: "Such killing, when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree, unless it be murder in the first degree (as above defined), or manslaughter, or justifiable or excusable homicide, as hereinafter provided."

The punishment of murder in the second degree is fixed by section eight, at an imprisonment in a State prison for a period of not less than ten years.

The construction which I have given to this statute is confirmed by the subsequent provisions of the statute, on the subject of manslaughter. This offense, in the first, second and third degree, is defined by the statutes, and the punishment is fixed at confinement in the State prison, for periods ranging from two to seven years. The nineteenth section of the statute provides that every other killing of a human being shall be deemed to be manslaughter in the fourth degree. The punishment of this offense is by imprisonment in a State prison for two years, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding \$1,000, or by both such fine and imprisonment.

It has been suggested that the killing of a human being, when perpetrated without a design to effect death, by a person engaged in the commission of a felony, might be punished within the terms of section nineteen, and that constitutes the offense of manslaughter in the fourth degree. This would be quite unwarrantable, when we consider the very slight degree of punishment inflicted by that section, compared with the magnitude of the offense, and the greater punishment inflicted for the commission of much lighter crimes, as defined by the three preceding degrees of manslaughter. I feel therefore quite justified in making the assertion, that unless the crime of murder in the second degree consists in what I have defined it to be, it is entirely unprovided for in the statute. This is an absurdity not to be tolerated.

The prisoner's argument in legal effect is this : that he is charged by the indictment with an offense which may be found by the jury to be either murder in the first degree or murder in the second degree ; that the jury have found a general verdict only against him ; that this may have been founded upon facts which would justify a conviction of the minor offense only, and that therefore a judgment based upon a verdict as for the greater offence is erroneous. This argument I do not consider sound. In *People v. Enoch* (*supra*), it was charged that the defendant killed his wife feloniously and of malice aforethought,

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the words "with premeditated design" being omitted. The law had been so altered by the revised statutes, that a killing which occurred in commission of a misdemeanor simply, was not murder. It would be manslaughter merely. Malice aforethought embraced a class of offenses which did not then constitute the crime of murder. The prisoner, then, stood indicted for an offense which might be murder or might be an inferior offense, and yet upon a general verdict of guilty, and a judgment inflicting the punishment of death, the court of errors sustained the judgment. The chancellor gave the answer which I have already cited, "that it is the duty of the court to see that a proper direction be given to the jury in point of law upon the evidence, and if either court or jury err, the appropriate remedy must be sought." No objection is taken to the charge of the judge in the present case, and we are to assume that the judge explained to the jury the law of murder in its different degrees, and the law of manslaughter as defined by the statute, and that the jury rendered an intelligent verdict upon such understanding of the statutes. If this case had contained the charge of the judge in which it had been stated, that, to constitute murder in the first degree it must appear to them that the killing was from a premeditated design to effect the death of a human being, or that it was perpetrated by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, or when committing the crime of arson in the first degree; and that if perpetrated when engaged in the commission of any other felony, it would be murder in the second degree only, the charge would have been correct, and a general verdict would have justified the sentence given. We are to presume that the law was thus explained to the jury, and that they fully appreciated the effect of their verdict. The absence of an objection admits it.

It has always been held to be the law that upon an indictment charging the offense of murder and nothing else, the prisoner might be convicted of manslaughter. The same allegations in the indictment would maintain a

conviction for murder, or would justify a verdict of manslaughter merely. The result depends upon the proof, the direction of the judge, and the opinion of the jury. As these elements require a conviction of the greater or minor offense, such will be the result. As the same elements require a conviction of murder in the first degree, or of murder in the second degree, such will be the result.

The case of Enoch has stood as the law on this subject for more than thirty years. To overrule it would be a rash overthrow of a settled authority, under which many persons have suffered the extreme penalty of the law. The objection on which the prisoner's argument is based, is purely technical; it is not even suggested that the law was not accurately explained to the jury, or that his rights were not properly guarded.

The judgment should be affirmed.

WOODRUFF, J.—The plaintiff in error was indicted, tried, found guilty and sentenced to death, at the court of oyer and terminer, for the county of Westchester. By writ of error the judgment was brought under review at the general term of the supreme court for the second district, and was there affirmed; and the court thereupon appointed a day for the execution of the sentence. A writ of error was thereupon sued out by plaintiff in error, and the proceedings were thereby removed to this court, and a stay of execution until the further order of this court, was obtained.

The indictment charged that the plaintiff in error, feloniously, willfully, and of malice aforethought, made an assault upon one Ellen Hicks, with a gun, charged with gunpowder and bullet, which he held in his hands, and at and against the said Ellen Hicks, did feloniously, willfully and of his malice aforethought, shoot off and discharge, and with such bullet, by means of the shooting off and discharging the said gun, the said Fitzgerrold did, then and there, feloniously, willfully and of his malice aforethought, strike, penetrate and wound the said Ellen

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Hicks, giving to her * * one mortal wound, * * of which said mortal wound, the said Ellen Hicks did, then and there, soon after die. * * * And the jurors aforesaid, * * say, that the said Fitzgerrold, her the said Ellen Hicks, in the manner and by the means aforesaid, feloniously and of his malice aforethought, did kill and murder. * * *

It is insisted on behalf of the plaintiff in error, that the offense of murder in the first degree is not charged in the indictment, and that, therefore, a verdict of guilty does not warrant a judgment condemning the plaintiff for that offense.

In 1834, the court of errors in this State, in *The People v. Enoch* (13 *Wend.*, 159), by an unanimous opinion affirmed the judgment of the supreme court, which held that an indictment charging the act to have been committed feloniously, willfully, and of his malice aforethought, was a sufficient charge of murder in the first degree, although the revised statutes then defined murder as killing in the following cases :

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated without any design to effect death, by a person engaged in the commission of a felony (2 *Rev. Stat.*, 657, part 4, ch. 1, § 1).

The present statute (*Laws of 1862*, 369, ch. 197) defines murder in the first degree in the same terms, except that the third subdivision reads, "when perpetrated in committing the crime of arson in the first degree."

Under the indictment above mentioned Enoch was convicted of murder, sentenced to be hung, and the conviction and judgment were therein sustained.

The ground was distinctly taken and ably and elaborately argued, that the charging the act to have been with

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malice aforethought, was not a sufficient description of a killing with a premeditated design, and that therefore the conviction should not be sustained. And the precise argument now urged upon us was there earnestly pressed, viz.: that "had the accused on his arraignment pleaded guilty to the charge, the court would not have known what judgment to pronounce," *i. e.*, whether the punishment of murder in the first degree, death, or of manslaughter, imprisonment in the State prison.

The court were of the opinion and held, that the statute had not changed the form of pleading or the requisites of an indictment. That the words "with malice aforethought," include express malice, which is all that is expressed or intended to be expressed by "premeditated design," and are legal and appropriate language to express it. The opinion of the chancellor in the court of errors was, that murder being a common law offense, and the law having adopted certain technical expressions to define the offense, the crime must be described in the indictment, or the intention be expressed in those technical terms, and no other. And that therefore in an indictment for murder the terms "murder" and "of malice aforethought," are to be considered absolutely necessary, and without them it would be deemed a case of manslaughter.

This case clearly and necessarily sustains the indictment now in question—it holds that the statute has introduced no new rule of pleading to describe a killing with premeditated design. That the court, on the trial, must instruct the jury as to what should be proved to sustain such an indictment, and in the giving of such instructions the statute is a guide, and any error in such instructions is to be corrected on exception thereto.

The decision in *People v. Enoch* was affirmed by the supreme court in *People v. White* (22 *Wend.*, 167). There the pleader, in order to avoid question, had added to the charge of killing "with *malice aforethought*," the words of the statute, "and from premeditated design to effect his death," etc. The supreme court held that these latter words were unnecessary and mere surplusage. That the

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other words, being in the form of a common law indictment, let in proof of any species of murder as defined by the section of the statute. Hence that the words "with premeditated design," etc., might be rejected or disregarded.

The court of errors (24 *Wend.*, 520) held that the pleader, by introducing the words "with premeditated design," etc., had adopted them as descriptive of the specific act charged, viz. : the description in the first subdivision of that section of the statute which defines murder ; and as matter of description he had made them material. But the opinions of this court show that the words were not necessary to the validity of the indictment, and so far from retracting or reversing the decision of the same court in *People v. Enoch*, language of direct affirmance is used in the opinions. Thus (p. 580), "since the decision in the case of *Enoch* in this court, no doubt can be entertained that a common law indictment charging the offense, to have been committed of *malice aforethought*, would be good for either of the offenses described in the first or second subdivisions of the section." Had the indictment been so drawn, and without the words "with premeditated design, etc., no doubt can be entertained that the charge of the court to the jury would have been correct and the conviction good" (p. 571). It is true that, according to the reason of the thing as well as the decision of this court in *People v. Enoch*, a general count charging murder *with malice aforethought*, would be sufficient, and would be sustained by any sort of murder whatsoever within the statutory definitions.

These decisions involve no discussion of the extent to which the manner of the killing must be described, in order to avoid a variance and let in proof of the actual facts. Such a description will, in general, show to which subdivision of the statute the charge refers. But that it is necessary to use the words "with premeditated design, etc.," in order to constitute a valid indictment, and that such design is sufficiently alleged in the charge with *malice aforethought*, is the clear doctrine of these cases.

In *People v. Clark*, in this court (7 *N. Y.*, 385), no question arose on the form of the indictment. The inquiry was what degree of deliberation is essential to constitute premeditated design; but in the discussion, Mr. Justice JOHNSON says that the words "premeditated," "aforethought," and "prepense," possess, etymologically, the same meaning, and are * * synonymous, expressing a single idea, and possess in law precisely the same force. But as "malice prepense" had obtained a broader meaning than belongs to "premeditated" design, the statute required, in order to a conviction of murder under the first subdivision, the existence of the actual intention to kill. The existence of such intention must therefore be proved on the trial, to sustain such an indictment, under the first subdivision.

The result of these cases most clearly is, that the crime of murder is sufficiently charged, when alleged as in the present indictment "with malice aforethought." But, in order to prove the crime, the proofs must establish a case within the requirement of the statute in one of its three subdivisions. And the party indicted is entitled to proper instructions to the jury as to what facts must be found to sustain the indictment. And a verdict of guilty as charged in the indictment, is a finding of guilty of murder in the first degree, and judgment thereon, and condemnation to the punishment awarded to that crime necessarily follows.

We find no reason for departing from these views of the law. If I doubted their accuracy, I should hesitate in disturbing the cases which have been the guide of public officers and the test of correct pleadings for more than thirty years, unless I saw that some wrong was done or some evil was created by continuing a form of indictment so long approved, the meaning, force and effect of which was well understood, so that no party indicted could possibly be surprised or placed at disadvantage on the trial, if the law was rightly declared to the jury; and if in that respect there was error, that may be corrected.

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I have, however, no doubt on the subject. I think the decision in *People v. Enoch*, founded in good sense and correct in law, and that it is decisive in the case before us.

In a case in which the questions raised involve the life of a human being, I was disposed to consider carefully what could be urged by the counsel for the plaintiff in error, although the case did not seem doubtful; but the result of such consideration is, that the judgment must be affirmed.

Judgment affirmed.

THE BANK OF PRINCE EDWARD'S ISLAND
against TRUMBULL.

Supreme Court, First District; Circuit, February, 1868.

CONTRACTS PAYABLE IN GOLD.—HOW ENFORCED.

In an action upon a contract made since the passage of the legal tender act, —*e. g.*, a bill of exchange drawn abroad and accepted in this country,— which is by its terms made “payable in gold coin,” the plaintiff is entitled to judgment for a sum equal to the value, at the time of the trial, of the specified amount of gold estimated in currency.

Trial by the court.

This was an action upon a bill of exchange drawn “payable in United States gold coin,” and accepted by the defendant.

Barbour & Hyatt, for the plaintiffs.

Chapman & Scott, for the defendants.

MULLEN, J.—The general term in the first district, held, in the case of the Bank of the Commonwealth v. Van

Vleck, in December last, that the plaintiff, who had loaned to the defendant \$10,000 in gold, to be paid in gold, was entitled to judgment for an amount equal to the value of the gold, at the time of the trial, in legal tender notes.

The plaintiff in the case before us claims to recover judgment for a sum in currency equal to \$2,000 in gold, upon a bill of exchange drawn for that sum in Charlotte-town, in Prince Edward's Island, by A. A. McDonald & Bro., on the defendant, payable in sixty days from the date thereof, and which was presented to and accepted by the defendant. The bill upon its face is payable in United States gold coin.

It will be seen that the cases are identical in principle; and whatever my own views of the law might be, respect for the court that decided the case of the Bank of the Commonwealth v. Van Vleck and Tucker, would constrain me to follow its decision, leaving it to the court of appeals to reverse the judgment, if, upon more full examination, it shall be found to be erroneous. I heard this case in that district, while holding court at the request of the presiding justice. I am not, therefore, at liberty to disregard a decision of its general term upon the precise question presented to me for decision.

I cannot leave the case, however, without briefly giving my reasons for concurring, as I do, in the conclusion at which the general term arrived in the case cited.

The constitutionality of the legal tender act is not open for discussion in this State, since the decision of the court of appeals in the case of the Metropolitan Bank v. Van Dyck (27 *N. Y.*, 400). It is also the settled law of the State, that in actions for the recovery of debts contracted before the passage of the legal tender act, the plaintiff can only recover the sum agreed to be paid, without any allowance for the difference in value between gold and legal tenders, notwithstanding the debtor may have agreed to pay it in gold or silver coin.

It must be considered, also, that the courts of this country that have been called to pass on this question, have been nearly unanimous in holding that debts con-

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tracted since the passage of the legal tender act, payable by the express agreement of the debtor in gold and silver coin, may be paid by the same amount in legal tender notes.

A contract entered into prior to 1862 for the payment of a given sum of money in gold and silver coin, received the same construction as it would have received had the words specifying in what the payment should be made not been in the contract. It was by law payable only in gold and silver coin, at the election of the creditor, if that provision had not been incorporated in it; in other words, it was construed as if it read, "payable in legal currency." When, therefore, such a contract was to be satisfied by payment since 1862, it receives the same construction, and is paid by an equal amount of legal tender notes. This construction of the contract became indispensable; or debtors would have been ruined, and the business of the country destroyed.

If this construction had practically the effect of taking from the creditor a portion of his property, it operated with equal severity upon the debtor; his property was reduced in value in the same proportion. The loss fell equally upon all classes. It was a part of the price we had to pay to save the republic. It operated very harshly upon the foreign creditor, holding a debt contracted before the war, and payable in this country, to compel him to accept payment in paper in lieu of gold and silver. But it was impossible to have one rule of law for our own citizens, and another for foreigners; the same rule of construction must apply to both, and hence each must accept the same measure of satisfaction.

Every contract then made was made, impliedly, if not expressly, subject to the power of Congress to make paper instead of coin a legal tender, or to debase the coin so as to render it of no more value than the same amount in legal tender notes. Whether such laws are just or wise, is a question for the legislative department, and with which the courts of the country have nothing to do.

Congress did not see fit to debase the gold and silver

coin of the country, nor has it repealed the law making gold and silver a legal tender in payment of debts, but it has secured a similar result by making a thing of inferior value of equivalent value in payment of debts. The debtor is no longer obliged to pay gold and silver, and the creditor is obliged to accept government notes in satisfaction of his debt.

The intrinsic difference in value between the paper made a legal tender by Congress, and gold and silver, is recognized both at home and abroad. Property is sold in our own and foreign markets at one price for gold, and for another in paper. This distinction can no more be got rid of than can the distinction between the cotton or linen out of which the paper is manufactured on which these notes are printed, and the metal out of which the coin is made.

It was not, I apprehend, the intention of the framers of the legal tender act to prohibit the making of contracts payable in coin. The necessities of commerce require that such contracts should be held valid. To hold that they cannot be made would be a most unwise and unnecessary interference with the rights of the citizen, and is uncalled for by the creditors of the government or the necessities of the people.

A merchant of New York orders from a manufacturer in England \$5,000 worth of cotton goods; the Englishman understands this to mean \$5,000 worth of goods, estimating the dollar as a dollar in gold; the account is made out on this basis. If the sale is on credit and to be paid in this country, the seller can only be paid by \$5,000 in gold, or their equivalent.

To obtain this he must make out his account by adding to the \$5,000 the amount necessary to make legal tender notes equal to gold. Before his account can reach this country, gold may have materially increased or lessened in price. By taking the value of gold on the day he ships the goods, he may subject himself to a loss, if gold should appreciate in value before the account is adjusted, or he may be demanding more than the purchaser is bound to pay if it has depreciated. If he leaves the amount to be

adjusted by the purchaser, a door is open for misunderstanding and litigation. Between countries enjoying the advantages of telegraphic communication, this difficulty may not arise, but there is still so large a portion of the world with which we have dealings, that has no such communication, that the practical difficulty exists in all its force.

It is also true that merchants may provide by their contracts against the annoyance to which I have referred. But the fewer restrictions upon and embarrassments laid in the way of commercial intercourse, the better. Instead of subjecting merchants to this uncertain and unsatisfactory mode of dealing, why not permit them to agree that an indebtedness shall be payable and paid in gold or silver, or its equivalent in paper? It cannot be doubted but that, when a contract, made since 1862, provides for payment of a given sum in gold coin, it is the intention that it shall be thus paid. If the *intention* of the parties is to govern, what right have the courts to disregard it, and compel the creditor to receive a sum less than it was the understanding and *intention* he should receive?

The reasoning of the judges seems to be that when the contract is to be performed here, the amount to be paid by its terms must be understood as payable in legal tender notes, and that the parties cannot agree that it shall be paid in coin. If it is legally possible for parties to bind themselves thus to pay, the defendant has done it in this case; the language is not open to two constructions, and the intent is perfectly obvious. To reach the result stated, the courts have been governed by the doctrine of the case of Penny v. Gleason (5 Wend., 394). In that case the defendant's agreement was to pay a certain number of dollars and cents in salt, at a price named per barrel; the court held that the measure of damages for a breach of the contract was the amount named in the contract, and not the value of the salt. The reasoning of the chancellor is, that by the contract the defendant had an election to deliver the salt or pay the amount in money; and, hav-

ing failed to deliver the salt, he was bound to pay the money.

I am unable to perceive that the decision in that case has any application to this. Salt was not and never had been a standard of value. Gold has been and is by law a legal standard of value. The price of salt was not fixed, but fluctuated as did other commodities in the market. Gold has not in fact varied in value. The paper which has been made a legal tender in payment of debts has varied, and because it is made a legal tender, and gold has thereby been treated as an article of merchandise, its value seems to fluctuate, whereas it is that of the paper only which fluctuates. That it is not the coin that changes in value, is proved by its being received in payment of debts in foreign countries, at the same valuation it received before the act of 1862, and it is so received here when we are required to go back to the gold standard.

We know that the value of the American gold dollar is, to-day, in this country and in Europe, of the same value it was seven years ago, and that value is not changed because we have established another and wholly fictitious standard; with respect to which, and with respect to which alone, its value has changed.

We have, as I have already suggested, two standards of value recognized by law, the one gold and silver, the other paper; either is a legal tender for a debt, and a contract which calls for payment in gold, calls for a payment in currency recognized by law, and there is nothing in law or in reason which forbids the parties making such an agreement; and I insist that when it is manifest that it was the intention of the parties that payment should be made in coin instead of paper, it is the duty of the courts to carry into effect such intention.

If the \$2,000, to pay which the bill in suit was drawn, were borrowed, the borrower, it is to be presumed, received it in gold or in property at gold prices.

If the bill does not provide for the payment of \$2,000 in gold, will any one inform me how the lender could have framed his contract so as to secure to himself pay-

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ment by the drawee of that sum, on the day it should be presented for acceptance or payment, and interest. As I have attempted to illustrate the case of the purchaser of the goods in England, it would be practically impossible to fill up the bill with an amount which, if paid in currency, would exactly equal the same number of dollars in gold. He might transmit the bill in blank to an agent to fill up with the true amount before presentation, or he might draw the bill, "for such a sum as will, on the day of presentation for payment, be equal to \$2,000 in gold."

But when the bill is thus drawn, is the intention of the parties any more clearly expressed that the bill is to be paid in gold or its equivalent, than when it is drawn "payable in gold coin of the United States?"

The sum named in a bill or other contract is, in the absence of any provision to the contrary, presumptively payable in whatever is at the time a legal tender in payment of debts; but when the parties designate some other currency which is not illegal, it is the right of the creditor to have awarded to him such measure of damages as will constitute payment in the currency intended, and it is the duty of the courts to award it. If gold and silver were not, both in law and in fact, legal currency, recognized and adopted by all classes of men, there might be some excuse for treating them as if they were articles of merchandise, and the debtor had the right to pay in them or in paper, at his election. But so long as they are recognized as currency, debts payable in them should be enforced, and the intention of the parties should have effect. I therefore order judgment in favor of the plaintiff for \$2,925.

*Affirmed,
6 Oct. S.J. 178*

THE PEOPLE *against* BENNETT.*Court of Appeals; September, 1867.*

INDICTMENT.—SUFFICIENCY.—CHARGE OF LARCENY.

The rule that indictment will be considered good, notwithstanding omissions in it, if the omissions complained of are, in common understanding, implied in that which is expressed,—approved and applied.

It is not necessary that an indictment should formally state that it was found by a *grand jury*; or by the legal *number* of grand jurors; or that they were *sworn*. These things may be implied from an indictment commencing “The jurors of the people of the State of New York, in and for the body of the county of —— upon their oaths present;” for only a grand jury, legally constituted, has power to present an indictment.

The distinction between the *caption* and the *commencement* of an indictment,—stated.

In an indictment for larceny of goods purchased for the use of a county poorhouse, and taken by the defendant from the premises of such poorhouse, it is proper to describe the goods as the property of the county.

In what cases the property in goods stolen may be laid, in the indictment, in a servant having mere actual custody of them at the time of the theft.

An inhabitant of a county is not disqualified by interest from serving on the jury, on a trial for stealing the property of the county.

The ~~value~~ and effect of confessions, as evidence in criminal cases,—considered.

Writ of error to the supreme court in the sixth district.

The defendant was tried for larceny, at the March term of the Cortland county court of sessions.

The indictment contained two counts. The first count charged the defendant with having feloniously stolen, taken, and carried away a quantity of pork, of the value of \$130, “of the goods, chattels, and personal property of one *Alonzo W. Gates*.” The second count recited the same transaction, only that it alleged the pork to be the property of the *county of Cortland*. After the trial of the indictment had been moved by the district-attorney, the

defendant's counsel asked the court to direct the district-attorney to elect upon which count he would try defendant. The court refused so to direct, and the defendant's counsel excepted.

The counsel for defendant then interposed a challenge to the array of jurors, on the ground that the jurors, being residents of the county of Cortland, and thus having an interest in the property mentioned in the second count, were disqualified from sitting as jurors on the trial. The court overruled the challenge, and the counsel for the defendant excepted. Each separate juror, as called, was challenged on the same ground, but they were admitted to sit, under the like exception.

After the jury had been impaneled and sworn, and the cause opened to the jury by the district-attorney, the defendant's counsel moved to quash the indictment, on the grounds :

1. That it did not appear on the face of the indictment that it was found or presented by a grand jury.

2. That it did not so appear that it was so found and presented by the requisite number of grand jurors.

3. That it was not alleged that the grand jury were charged and sworn by the court of sessions to inquire for the people of the State and for the body of the county.

4. That it did not appear on the face of the indictment that the same was presented by a grand jury, and at a court of sessions legally constituted.

The district-attorney objected that, after the plea of not guilty, it was too late to move to quash the indictment. The court denied the motion to quash, and the counsel for the defendant excepted.

On the trial it appeared that the property was stolen by the defendant from the wood-house attached to the county poorhouse of Cortland county, of which Alonzo W. Gates was the keeper. That Gates was hired for his position by the county superintendent of the poor, by whose directions he (Gates) had purchased the pork ; and that he had no interest in the property, except as the employee of the superintendent ; and that it was for the use of the poor-

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house. The superintendent ordered Gates to buy the pork. Gates did so, getting his note discounted to pay for it, and afterwards took up his note by an order of the superintendent on the county treasurer for the amount.

The counsel for the defendant moved to quash the indictment; and afterward moved that the court direct the jury to acquit, on the ground of variance—the proof showing as he alleged, that the pork was neither the property of Gates nor of the county of Cortland. The court denied the motions, and the defendant's counsel duly excepted. The defendant's counsel then requested the court to charge in substance that, under the testimony, Gates had neither a general nor a special property in the pork, and that such property was not in the county, but belonged to the superintendent, as a corporation under the statute. To the refusal of the court so to charge the counsel for the defendant excepted.

The defendant was convicted, and sentenced to five years' confinement in the State prison at Auburn.

At a general term of the supreme court of the sixth district, held in July, 1867, the judgment of the court of sessions was reversed, and it was ordered that the defendant be discharged from imprisonment. From this judgment and order the case a writ of error, was sued out by the people, to the court of appeals.

John H. Reynolds, for the plaintiffs in error.

A. J. Parker, for the defendant in error.

FULLERTON, J.—After the plea of not guilty had been entered, and the trial moved by the district-attorney, the counsel for the prisoner made a motion to quash the indictment, because:

1. It did not appear on the face of the indictment that it was found or presented by a *grand* jury.

2. Because it did not appear upon its face that it was found and presented by the requisite *number* of grand jurors.

3. Because it was not alleged in the indictment that the grand jury were *charged and sworn* by the court of sessions to inquire for the people of the State of New York, and for the body of the county of Cortland.

These and similar objections are frequently made to the form of an indictment, and it is therefore proper to consider, in the first place, what constitutes a valid presentment of a grand jury.

We have inherited from England many technical rules relating to criminal practice, which have long since become obsolete. They had their origin in that period of English history when the most trivial offense was punishable with death, and when it was almost a foregone conclusion, if the sword of justice was drawn, it must return bathed in blood. It is not to be wondered at that humane judges should have been found, in such an age, willing to save life by attaching importance to objections, purely technical, to the form of indictment which placed the accused on trial. An advanced civilization, and a more humane administration of the law, have removed the causes which gave rise to these technical rules, and there is, therefore, no good reason for retaining them. *Ratione cessante, lex ipsa cessat*. So thought our legislature when it passed the statute of jeofails, and enacted that no indictment should be deemed invalid by reason of the omission of the defendant's title or occupation, or by a misstatement of them, or of the town or county of his residence, where the defendant shall not be prejudiced thereby; or by an omission of the words "with force and arms," or words of similar import, or by an omission to charge any offense to have been committed contrary to a statute, or by reason of any other defect or imperfection in matter of form which shall not tend to the prejudice of the defendant.

This statute swept away many of the objections to the forms of indictments, which, at times, seriously interfered with an effective administration of criminal justice. A more liberal practice began to prevail at an early day in England. BACON says: "Some indictments have been quashed for the omission of the names of the jurors; and

others for want of the words *good and lawful men*; and others for want of the words *and then and there sworn and charged*; and others for want of the words *to inquire for the king and for the body of the county*; yet of late years exceptions of the kind have not been much favored, especially if the indictment were in a superior court; *and that which is omitted, be, in common understanding, implied in what is expressed*" (Bac. Abr., tit. Indictment, I).

This is a sound rule, and one that is safe to follow. It does not deprive an accused party of a fair trial on the merits, nor does it, on the other hand, open an easy door for an escape on technical grounds. Applying this rule, the form of this indictment should be considered good, if the omissions complained of, are, in common understanding, implied in that which is expressed.

That part of the indictment which is complained of as defective is as follows:

"Court of sessions:

"Cortland county, ss. The jurors of the people of the State of New York, in and for the body of the county of Cortland, upon their oaths present."

Then follow apt words charging the defendant with the commission of a larceny. Here are all the requisites of a good commencement to an indictment. It plainly appears to have been found in the court of sessions for the county of Cortland, and by the jurors of the people for said county. It is true that it does not allege that it was found by a *grand jury*, or by the legal *number* of grand jurors; but these are plainly implied, because that body, legally constituted, alone have the power to present any one for trial.

This has been frequently decided (McClure v. The State, 1 Yerg., 206; per CATRON, J.).

The form of the indictment is identical, *mutatis mutandis*, with that long since adopted in England, and which has obtained in most of the State in our own country.

The form used in England nearly three hundred years

ago, was, "*Oratores pro domina regina presentant, quod,*" &c. (*West's Symboleography*, part 2, p. 96). And it has been continued without exception to the present day. A great deal of confusion, however, exists in the books, because the distinction between the *commencement* and the *caption* of an indictment, which has always existed in England, has not uniformly been maintained here. "The whole question as to what the *caption* should contain" (says BISHOP in his *Treatise on Criminal Procedure*, § 154) "appears, when approached through the American books, draped in mist and girded about with darkness." Observing the proper distinction between the *caption* and the *commencement* of an indictment, no valid objection will be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the proceedings when an indictment is removed from an inferior to a superior court.

As I have already stated, the form of an indictment, in many of our own States, and which is derived from England, is thus: "The jurors of the people of the State of ———, in and for the body of the county of ———, upon their oath, present," &c. This is the *commencement*, and all that it need contain. The caption is quite a different matter, and it has its origin in this way. Where an inferior court, in obedience to the mandate of the king's bench, transmitted the indictment to the crown office, it was accompanied with its history, naming the *court* where it was found, the *jurors' names* by whom found, and the *time and place* where found. All this was entered of record by the clerk of the *superior court* immediately before the indictment, and was called the *caption*, but it was no part of the indictment itself (1 *Bishop on Cr. Pro.*, §§ 145, 146; 1 *Stark. Cr. Pl.*, 2 ed., 233). A complete form of the caption is given in 2 *Hale's P. C.*, 165, and in 1 *Chitty Cr. Law*, 327.

This same practice prevailed in our State, when indictments were removed from the sessions to the supreme court, as will be seen in the case of *People v. Guernsey* (3 *Johns. Cas.*, 266), quoted by the respondents.

It often occurred that these captions were defective in the statement of facts sufficient to show that the inferior courts, where they were found, had jurisdiction. Then followed a motion in arrest of judgment, and decisions as to the requisites of a caption, viz. : that it should contain an averment that the indictment *to which* it was prefixed was found by a *grand* jury of good and lawful men, giving their names, and that they had been then and there sworn and charged, &c., &c. (vide 1 *Bishop's Cr. Pro.*, §155, note 1). The same doctrine is aptly stated in 3 *Burns' Justice*, 372, in these words : "The caption of the indictment is no part of the indictment itself" (2 *Hale*, 165) ; "but it is the style, or preamble, or return, that is made from an inferior court to a superior, from whence a certiorari issues to remove ; or when the whole record is made up in form : for, whereas the record of the indictment, as it stands upon the file in the court wherein it is taken, is only thus : *The jurors for our lord the king upon their oath present :*" the difficulty in our practice has grown out of the error of regarding these decisions as furnishing a test of what the indictment itself should contain, rather than its caption, when removed to a superior court. The consequence is, that in some of the States there has been introduced into the commencement of the indictment, the averments necessary to make a good caption, thus confounding the two (*Bish. Cr. Pro.*, §149, note 2). This has led to a great diversity of practice, and, necessarily, to confusion ; and it will be readily seen that the decisions of such States upon these questions have no application here, for the English practice has been adopted in our own State (*Barb. Cr. Tr.*, 180).

So far, therefore, as the objections in this case go to the form of the indictment, the latter must be considered good. Should an indictment be found in an improper manner, or by an insufficient number of jurors, the way is open for redress by motion, which secures to the accused party immunity from an illegal trial or punishment (*State v. Batchelor*, 15 *Mo.*, 207, 208 ; *Reg. v. Heane*, 9 *Cox Cr. C.*,

433, 436 ; 10 *Jur. N. S.*, 724 ; 3 *Q. B.*, 238 ; *Bishop's Cr. P.*, § 448).

I pass to the consideration of the other questions arising in this case.

To constitute a good indictment for larceny, the thing stolen must be charged to be the property of the *actual owner*, or of a person having a special property as *bailee*, and from whose possession it was stolen (2 *Arch. Pr. Cr.*, 7 ed., 257). Gates was neither the actual owner nor the bailee of the property stolen, and the first count in the indictment is therefore bad. He was employed by the county superintendent of the poor of Cortland county at a salary. The last-named officer is clothed by statute with the power "to employ suitable persons to be *keepers* of the poorhouses" (2 *Rev. Stat.*, 5 ed., 841, § 34). And it was under this power that Gates was employed. The superintendent is, by the same statute, authorized to "purchase materials" for the support of the paupers.

It is true that, in this instance, the keeper purchased the property stolen with his own money ; but it was an advance made for the superintendent, and he was by him subsequently, and before the larceny, reimbursed.

Neither was Gates in the actual possession of the property so as to have a *special* property therein. The character of his possession depends upon the tenure by which he held the property. If he were the mere servant of the actual owner, the possession was in such owner, not in him. If he were the servant, then the distinction between the *charge* and the *possession* of the property must not be overlooked. This distinction, though in ordinary language lost sight of, is necessary to be observed in dealing with the question under consideration.

Whilst no man is so high as to be above the reach of the law, no man is so low as to be beneath its protection. It is necessary, therefore, that we should observe critical distinctions in charging a man with a crime, lest his life or liberty should be twice placed in jeopardy. And such a case might arise if the defendant were again indicted for the same larceny, alleging the property to be in the *mas-*

ter. Whilst, therefore, in the popular use of the terms, the servant is said to be in *possession* of the master's property, yet in contemplation of law, he has the charge only. In this case, Gates could have been removed at the mere caprice of the superintendent, and his possession of the property was not such that he could have maintained a civil action for it against the thief. Indeed, if *he* had taken the property in the manner and with the design with which the thief did, he could have been convicted of a larceny (*Coats v. People*, 4 *Park. Cr.*, 662).

CHITTY thus states the rule: "It is a clear maxim of the common law, that where one has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. Thus, a butler may commit larceny of plate in his custody, or a shepherd of sheep. The same of a servant entrusted to sell goods in a shop. This rule appears to hold universally in the case of servants, whose possession of their master's goods, by their delivery or permission, is the possession of the master himself" (vide 1 *Den.*, 123, and cases there cited).

Adopting this as the rule, what practical distinction can be drawn between the relations which the butler, the shepherd, and the servant intrusted to sell goods, bear to their respective masters, and that which Gates bore to the superintendent who employed him? The position, therefore, that, as a mere servant, the possession of Gates was sufficient to support the allegation in the indictment, cannot be maintained (*Dillenback v. Jerome*, 7 *Cow.*, 294; *Commonwealth v. Morse*, 14 *Mass.*, 217).

There is another class of cases involving the possession of property, much relied upon on the argument, which it is necessary to notice. They are cases where the question arose as between *master* and *servant*, where the servant was indicted for stealing from the master, and where the property stolen, though received by the servant *for* the master's use, had never *actually* passed from the latter to the former. The rule in such a case is, "that if the ser-

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vant had done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is, in law, a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself upon a charge of *larceny*, at common law, in converting such goods to his own use" (2 *Russ. on Crimes*, 401, 4 ed. ; 2 *East P. C.*, 468). This rule has no application to the case under consideration.

In the second count the property was alleged to be in the county of Cortland, and it is argued that it is bad for that reason. It is claimed that the property was vested in the superintendent of the poor as a body corporate, and that, even if it were the property of the county, such property should have been alleged to be in the board of supervisors. To establish this latter proposition, the act is quoted which provides that "all acts and proceedings by or against a county in its corporate capacity shall be in the name of the board of supervisors of such county" (1 *Rev. Stat.*, 5 ed., § 3). Notwithstanding this statute, the board of supervisors as such possess no corporate powers (*Brady v. The Supervisors of New York*, 2 *Sandf.*, 460). The county is made a corporation by statute (1 *Rev. Stat.*, 5 ed., 846, § 1; *Brady v. Supervisors*, *supra*); and amongst its corporate powers is the right to purchase and hold such personal property as may be necessary to execute its corporate or administrative powers (§ 1, subd. 3). The statute designating the name in which legal proceedings by and against the county should be conducted was designed to simplify and lessen the expenses of litigation, and not to change the title of the corporation, or the name in which the property should be held.

Instances of similar legislation are not wanting. Actions by and against banks, formed under the general banking law, may be by or against the president thereof (2 *Rev. Stat.*, 5 ed., p. 560, §§ 194, 195). And a joint-stock company or association may sue or be sued in the name of its president or treasurer for the time being (3 *Rev. Stat.*, 5 ed., 777).

But it is contended that the title to the property stolen was vested in the superintendent of the poor, as a corporate body, he having purchased the same in his name, for county purposes, and that it should have been so laid in the indictment. This position cannot be maintained. The office of superintendent of the poor, although invested with corporate powers, is a mere agency of the county. The person who fills the office is required to give a bond to the supervisors for the faithful discharge of his duty, and is authorized to draw, from time to time, on the county treasurer for all necessary expenses incurred in the discharge of his trust. This creates the relation of principal and agent, and in no sense can the property bought by this officer be regarded as his. Considering, however, the nature of his office, he might be regarded as having a special property in the things stolen, so as to have made it proper to allege the property as belonging to him ; but, at all events, it was the property of the county of Cortland, and it was proper so to charge it.

My conclusion, therefore, is that the second count of the indictment is good, and that the judgment should be reversed.

PORTER, WRIGHT, BOCKES, and GROVER, JJ., concurred.

DAVIES, Ch. J.—The defendant in error was indicted in the Cortland sessions for grand larceny, in stealing from the county poorhouse a quantity of hams, which had been procured for the support of the poor of the county.

The indictment contained two counts. The first count alleged the property taken to be that of Alonzo W. Gates, who, at the time of the larceny, was the keeper of the county poorhouse, and had the custody and charge of the property there, and had, in fact, purchased these identical hams with his own money, by the direction of the superintendent of the poor of the county.

Before the larceny he had been reimbursed by a draft on the county treasurer of that county, which had been paid.

The second count of the indictment alleged the hams to be the property of the county of Cortland.

The defendant was found guilty as charged in the indictment, and was sentenced to imprisonment in the State prison for the term of five years.

Upon a writ of error brought to the supreme court, that court reversed the judgment and conviction, and ordered the discharge of the prisoner, upon the ground that the property taken was that of Benjamin, the county superintendent of the poor, and that it was erroneous to charge, in the indictment that the same was the property of Gates. The people bring their writ of error to this court.

It is now insisted on the part of the prisoner that the possession by Gates of the property taken was not of such a character as authorized the averment in the indictment that it was the property of Gates. It is undeniable that in an indictment for larceny it is essential that the pleader should aver the title or ownership in the property stolen to be in the true owner, if known; and if not known, then it should be averred that the owner was to the jurors unknown.

This is a general rule in criminal pleading, and, in applying it, it has been held that the owner was one who had a general or special property in the thing taken. In the present instance, Gates had purchased the property taken with his own money, and he had, at the time of the theft, as keeper of the county poorhouse, the actual possession and control of the stolen property. After the purchase by him, and before the larceny, he had been reimbursed the amount of his expenditure, by a draft on the county treasurer of the county of Cortland, and on payment of which, out of the funds of the county, it would seem to be clear that the hams stolen became the property of the county of Cortland. I cannot find any warrant for saying that the same was the property of Benjamin, the superintendent of the poor of that county; neither can I assent to the position that Gates, the keeper of the county poorhouse, was the servant of Benjamin, the superinten-

dent. If a servant at all, he surely was that of the county, whose agent he was, and the circumstance that the superintendent was the source of appointment did not make him the servant of that officer. The latter was, in fact, but the agent or servant of the county, and whatever he did as such was done for and in behalf of the county of Cortland. As well might it be said that the numerous officers throughout the State authorized to be appointed by the governor, by his appointment of them become thereby his servants, instead of, as they are in truth, in common with the governor himself, the agents and servants of the people of the State.

The absolute owner of the property stolen must, therefore, be held to be that of the county of Cortland, whose money was taken and applied for the purchase thereof. The question then arises whether the averment to the indictment, that the ownership was in Gates, the agent or servant of the county, who had the actual possession and control of the property at the time of the larceny, was not itself sufficient. The cases abundantly sustain the position that an averment of ownership in the person having the actual possession and control of the thing stolen, at the time of the theft, is all that is required.

In a modern case in England, when a stage-coach had been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the coachman. There were three counts in the indictment; but one of them, which laid the property in the coach proprietors, failed, on account of a variation; another, which laid the property in persons unknown, was rejected by the court as improper; and the case, therefore, necessarily proceeded upon the remaining count, which laid the property in the coachman.

It appeared in evidence that the box was delivered by the servant of a tradesman, in London, to the book-keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and he delivered it to a porter, who put it into the coach; and that the

coachman, in whom the property was laid, drove the coach to a place about 38 miles from London, during which journey the box was stolen from the coach by the prisoner. It also appeared that the proprietors of the coach never called upon the coachman to make good for any loss, except when it happened by his neglect, and that for goods stolen privately from the coach they never expected any compensation from the driver. The jury having found the prisoner guilty, the case was stated for the consideration of the judges, and after it had been ably argued, and much considered, a majority of the judges were of opinion that the property was well laid to be in the driver. HOTHAM, B., who delivered the opinion, said "that the material question was whether the driver had the possession of the goods, or only the bare charge of them, but that the case was not open to that distinction ; for although as against his employers, the masters of the coach, the mere driver can only have the bare charge of the property committed to him, and not the legal possession of it, which remains in the coach-master, yet, as against all the rest of the world, he must be considered to have such a special property therein as will support a count in charging them as his goods ; for he had, in fact, the *possession and control of them*, and they are intrusted to his custody and disposal during the journey. . . . That the the law, therefore, on an indictment against the driver of a stage coach, or on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach ; but, on a charge against any other person for taking them tortiously out of the driver's custody, he must be considered as the possessor, and therefore it was well said that he was the owner" (Rex v. Deakin & Smith, Q. B., 1800, 2 *Leach*, 862, 876 ; 2 *East. Cr. L.*, 653, ch. 16, § 90).

In the case of Regina v. Rudick (8 *Carr & P.*, 237), Busby was the servant of Webb, and was sent out by his master to receive money for him from his customers, and he was robbed of such money before it reached his master, on his way home. In the indictment the property was laid

as that of Webb, and prisoner's counsel contended that it could not be laid as the property of Webb, as it had never reached his hands, except by the possession of his servant.

MR. BARON ALDERSON was inclined to think the money could not be laid as the money of the master, but, as the grand jury was in session, recommended that a new indictment be found, which was immediately done, which laid the money, in one count, as the property of Busby, the servant, and in the other as the property of Webb, and on this indictment the prisoner was convicted. In *Regina v. Bird* (9 *Carr & P.*, 44) it was held that it was well laid in the indictment that the property stolen was that of one Miers, although he had only the possession of it, one Keyzor being the actual owner. Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either (21 *Me.*, 586 ; 22 *Id.*, 171 ; 4 *Carr. & P.*, 381 ; 8 *Tex.*, 115) ; as for instance, goods left at an inn (2 *East P. C.*, 658), or intrusted to one for safe-keeping (1 *Leach*, 356 ; *Rex v. Stalthem, Ib.*), or cloth left with a tailor, or linen with a seamstress (2 *Whart. Cr. Law*, §§ 1824. 1830).

In *Owen v. State* (6 *Humph.*, 330), a horse got loose from his owner, Booth, and was taken in the field of Edmondson, and was placed in his stable, from whence it was stolen.

It was held that the property was well laid in Booth, the owner, and also in Edmondson, the temporary possessor ; that the horse was in the constructive possession of the owner, and in the actual possession of Edmondson, and that the indictment might well allege the property to be in the owner, or in the third person in whose possession it was found at the time of the larceny ; and it was also held that a general finding of the jury, on both counts of the indictment, was well sustained by the proof, and the conviction legal and regular.

But the principle of these cases has been recognized and affirmed by the courts of this State.

In *Ward v. People* (3 *Hill*, 395), the prisoner was

indicted and convicted of stealing property from one Flagg, and the indictment averred that the property stolen was the property of Flagg. It in truth was the property of another, and Flagg had himself stolen it from the true owner. Flagg was asked on the trial if he had not stolen the butter. The court in its opinion says: "If the question had been answered in the affirmative the fact would have been immaterial, because possession of property in the thief is sufficient to make it the subject of larceny; and the title may be laid either in the owner or in the thief." This case was taken to the court for the correction of errors, and the judgment of the supreme court there affirmed (6 *Hill*, 144). Senator FOSTER read an opinion combating the views of the supreme court, that possession of the thing stolen was sufficient to authorize an averment of ownership in the possessor; but his views received only the assent of five senators, who voted for reversal, and fourteen members of the court voted for the affirmance of the judgment. We are authorized, therefore, to assume from these cases, that Gates having the actual possession of the goods stolen, it was well laid in the indictment that he was the owner thereof. That if there could be any doubt on that subject, the county of Cortland must be considered to have been the true owner of the property; and that a conviction upon an indictment containing two counts, one of which laid the ownership in the actual possessor of the goods stolen, and the other in the true owner, is good, and should be sustained.

There remains to be considered some other objections urged by the prisoner's counsel. The prisoner's counsel challenged the array of jurors, on the ground that the property stolen, being alleged, in the second count, to be that of the county of Cortland, the jurors, being inhabitants of said county, were interested, and therefore disqualified to act as such. This challenge assumes that the property stolen was the property of the county of Cortland. This assumption we deem to be correct. But in our judgment this fact furnishes no ground of disqualification of a juror, being an inhabitant of that county, to sit

on an indictment of the thief. Can it be seriously urged that, if the State capital is fired by an incendiary, that all the inhabitants of the State are disqualified to sit as jurors on his trial, because the building destroyed is the property of the State, and all the inhabitants of the State are interested in the property of the State? The statement of the proposition carries with its own refutation. The court properly overruled the challenge. We think there was no reason for quashing the indictment, upon the ground suggested.

The indictment showed, upon its face, that it was presented in the court of sessions of Cortland county, by the jurors of the people of the State of New York, in and for the body of that county, and that they presented the same upon their oath.

We think this indictment is in the usual and approved form, and contains all the requirements of the statute.

It is also claimed that the judge erred at the trial in refusing to charge the jury, in the language of Mr. Justin, that "in cases of felony, confessions are regarded as the weakest and most suspicious of all testimony; liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with precision, and incapable in their nature of being disproved by other negative evidence" (4 *Black. Com.*, 357).

It is to be observed, in the first place, that BLACKSTONE uses this language in connection with his criticisms upon State trials for treason in England; and, although he intends his observations to have a general application to all cases of felony, he regarded them as primarily to be considered in State trials for treason. But the annotator, upon this text of BLACKSTONE thus remarks, in a note: "It seems to be now clearly established that a free and voluntary confession by a person accused of an offense, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced to writing or not,—in short, that any voluntary confession, made by a prisoner to any person, at any

time or place, is strong evidence against him ; and, if satisfactorily proved, sufficient to convict without any corroborating circumstances. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise ; for, however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or of interest than from a sense of guilt ” (citing *Phil. Ev.*, 86).

Such undoubtedly is the rule, as enunciated by the most authoritative text-writers. Mr. BURRILL says : “ Confessions of this kind, when deliberately and voluntarily made, are justly regarded as constituting the highest and most satisfactory species of evidence that can be presented before a tribunal ” (*Burrill on Circum. Ev.*, 495 ; citing numerous authorities). Judge GREENLEAF, while sanctioning this doctrine, very properly observes that “ the evidence of verbal confessions of guilt is to be received with great caution.” And he adds : “ Subject to these cautions, in receiving and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. The degree of credit due to them is to be estimated by the jury, under the circumstances of each case ” (1 *Greenl. Ev.*, §§ 214, 215, citing *Coon v. State*, 13 *Smed. & M.*, 216 ; *McCann v. State*, *Id.*, 471). In 2 *Russell on Crimes*, 924, it is said, “ A free and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true.” The author adds in a note : “ Mr. J. BLACKSTONE and Mr. J. FOSTER entertain a different opinion ; ” and then quotes from 4 *Black. Com.*, 357, and from *Fos.*, 243, and in the text he further says : “ And the highest authorities have now established that a confession, if duly made, and satisfactorily proved, is sufficient alone to warrant a conviction

without any corroborating evidence *aliunde*" (citing numerous authorities).

The court committed no error, therefore, in refusing to charge the jury in the language requested.

In view of these considerations, the judgment of the supreme court should be reversed, and the judgment of the court of sessions of Cortland county be affirmed; and the record be remitted to the supreme court to proceed therein according to law.

Judgment reversed.

KARNES *against* THE ROCHESTER AND GENESEE VALLEY RAILROAD.

Supreme Court, Seventh District, Special Term, Dec., 1867.

SUITS AGAINST CORPORATIONS.—PART II

An action cannot be maintained against a corporation by one of its stockholders, to compel it to declare and pay a dividend, from funds on hand. A corporation stands in no fiduciary relation to its stockholders. The directors, not the corporate body, are the trustees, and should be parties to any action for the enforcement of the trust.

Demurrer to complaint.

The action was brought by plaintiff "on behalf of himself and all others having a common interest in the subject-matter thereof."

The complaint alleged that the defendant was a railroad corporation, organized under the laws of this State, and owning and operating a railroad within the limits of this State. That its paid-up capital stock, entitled to participate in dividends, was \$555,700, in shares of \$100 each, of which shares the plaintiff owned one hundred, and the

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city of Rochester three thousand. That the number of its directors was fixed by law at thirteen. That the city of Rochester claimed to be entitled by law to choose seven of the directors, without having any voice in the election of the remaining six, which are to be chosen by the other stockholders. That, therefore, the common council of that city, at the time of the annual election in June, 1867, elected seven persons to act as directors. That the other stockholders claimed to be entitled by law to elect nine of the directors, and insisted that the city is entitled to choose only the remaining four. That such stockholders did, accordingly, at the same election, elect nine persons to act as directors. That proceedings have been commenced to determine the rights of the parties, under the law, as to this question.

The complaint further alleged that the defendant corporation had on deposit and in government bonds about \$36,000, besides earnings for October and November, 1867, not yet received, but due. That the floating debt outstanding was about \$1,000 only, which will probably never be called for; and the funded debt was \$70,000, payable in seventeen years, at six per cent. interest. That the yearly current expenses are: Interest on funded debt, \$4,200; taxes, say \$5,000; incidentals, say \$1,000.* That the defendant had no need of any part of the money on hand, or of its earnings, except to pay current expenses. That the balance thereof belonged to the stockholders, and ought to be divided among them according to their several interests. That neither set of directors was in a position to declare a dividend, until the courts shall have determined their rights; and meanwhile the surplus money ought to be distributed.

The complaint prayed for a reference to ascertain the amount of money on hand; the amount earned and not received, and when it would be due; the true or probable amount required to discharge the current and necessary expenses of the company; the amount, if any, necessary

* The road was under a lease to another company, providing for payment by the lessee of the operating expenses.

to be retained in the treasury to meet present and current expenses; and the amount that could safely be distributed among the stockholders; also, to report the names of stockholders and the amount held by each; to the end that on the coming in of the report, judgment might be given for a distribution of the amount so reported, among the stockholders, according to their interests, and for general relief.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

Theodore Bacon, in support of the demurrer;—cited *Verplanck v. Mercantile Ins. Co.*, 1 *Edw.*, 84; *Luling v. Atlantic Mutual Ins. Co.*, 45 *Barb.*, 510, 515; *Carpenter v. N. Y. & N. H. R. R. Co.*, 5 *Abb. Pr.*, 277, 280; *Ang. & A. on Corp.*, ch. IX., § 10, 3 ed., pp. 304–306.

John McConvill, for the plaintiffs;—cited *Scott v. Eagle Fire Co.*, 7 *Paige*, 198.

JOHNSON, J.—The plain object and purpose of the action is, to have this court, first, take the place and perform the duties of the board of directors of the defendant, in making a dividend out of the gross earnings of the defendant, in its business, amongst the several stockholders, and then decree payment of such dividend to each respectively. The demurrer admits all the material facts stated in the complaint to be true, and the only question is, whether, upon the facts thus stated and admitted, any cause of action, in favor of the plaintiff against the defendant, is made to appear.

I am very clearly of the opinion that no cause of action is stated in the complaint against the defendant, and that no such action can be maintained by a corporator against the corporation of which he is an integral part.

1. The complaint does not show any legal title to the fund in question, or any part thereof, either in the plaintiff or in any or all the stockholders together, nor any equitable claim thereto. The property of every cor-

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poration, including all its earnings and profits, belongs, primarily, to such corporation exclusively, and not to its stockholders individually or collectively. They have a certain claim, it is true, but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of ownership than the former. No stockholder can entitle himself to any dividend or to any portion of the capital stock until all the debts are paid (*Story Eq. Jur.*, § 2152; *City of Utica v. Churchill*, 33 *N. Y.*, 161, see opinion of DENIO, Ch. J., pp. 237, 238; *People v. Commissioners of Taxes*, 35 *Id.*, 441; *Queen v. Arnand*, 9 *Ad. & E. N. S.*, 806).

The complaint shows upon its face that the funds on hand, which the plaintiff asks to have divided, and distributed among the several stockholders, are only about half sufficient to pay the indebtedness of the defendant. It is of no sort of consequence, in a legal point of view, that the debt is not yet due, and has a number of years to run before it matures. The creditors still have the better right to the funds, which the defendant holds for them in trust. The court cannot undertake to say judicially that the future business of the corporation will be prosperous; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue.

The board of directors, in their discretion, and in view of all the facts within their knowledge, might do this; but no court, I apprehend, would ever undertake to deal in such a manner with the funds of a corporation which was indebted to an amount at least double the fund sought to be distributed. It is enough, however, to defeat the action, that no title to the fund is shown in the plaintiff or in those for whom he prosecutes.

2. No breach of any obligation, on the part of the defendants, to the stockholders, or any of them, nor any omission of duty, is alleged in the complaint.

The corporation does not stand in any fiduciary relation to its stockholders. Such a relation between the corporation and its corporators, is shown, in a well-reasoned

opinion by Vice-Chancellor McCoun, in *Verplanck v. Mercantile Ins. Co.* (1 *Edw.*, 87), to be impossible (*Ang. & A. on Corp.*, 306). The stockholders are in no sense creditors of the corporation, nor are they in the situation of partners. They are constituent parts of the corporate body. In a general sense, a corporation may be regarded as the trustee of its creditors, but not of its stockholders. The action has, therefore, no foundation of a trust to support it.

3. The directors stand in the relation of trustees to the stockholders, and between them exists the relation of trustee and *cestui que trust* (*Ang. & A. on Corp.*, 3 ed., 304, 305; *Butts v. Wood*, 38 *Barb.*, 181). It is the sole and exclusive duty of the board of directors to declare dividends amongst the stockholders whenever, in their judgment, the condition of the affairs of the corporation renders it expedient, and just to all concerned. And with the exercise of this duty in good faith, courts will never interfere, unless to prevent injustice (*Luling v. Atlantic Ins. Co.*, 45 *Barb.*, 510).

The corporation can make no dividend; and the directors, whose duty it is to make it, if any ought to be made, are not parties to the action. It is not even alleged that they have refused to make one, and, as before remarked, it is not shown by the complaint that one ought in justice to be made. The action is sought to be maintained, upon the fact alleged, that the stockholders have elected two boards of directors, each of which claims to be the legal representative of the corporate body, and that the two boards are engaged in a litigation for the purpose of determining which is the legitimate representative and which the pretender. Of course but one of these claimants is entitled to the management of the corporate affairs. And the presumption, I think, is, that one of these bodies is the legal one, so that the corporation is not destitute of the necessary officers and agents to manage and control its affairs. These conflicting claimants as appears from the complaint, are now engaged in litigation, before the proper tribunal, where the validity of their respective claims will

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be in due time determined. But this contest does not in my judgment give the court any authority or furnish any ground for it to step in, in the meantime, and take charge of the affairs of the corporation and perform the duties of its existing legal board of directors. I am sure no action of this kind, for such a cause, has ever before been brought and maintained, and I should hesitate long before establishing such a precedent, at once so dangerous to the well-being, if not the very existence of corporations, and so intolerably burdensome and vexatious to the courts.

The stockholders have voluntarily involved themselves in the dilemma of two boards of directors, each claiming control, and they must now wait until this grievance is redressed, and the right declared, through the only channel known to the law. This course the conflicting claimants are now pursuing. But there is, in truth, no *interregnum*; and the stockholders have no right, merely because they have voluntarily placed themselves in this situation, to require the court to step in and take the place of a board of directors, during the warfare between these rival claimants.

The facts alleged, do not, as I conceive, bring the case as between these parties within any recognized head of equity.

The demurrer is therefore sustained, and judgment ordered for the defendant.

GRAY *against* CROQUET.*Supreme Court, Second District; February, 1868.*

PAROL TRUST.—DEFENSE IN EJECTMENT.

In an action by a purchaser for value from a married woman, of land which her husband purchased, but which was conveyed to her in her own name, and which she afterwards conveyed to plaintiff, brought to recover possession of the land, a parol agreement between the husband and the wife, though made before the plaintiff's purchase, that the land should be considered as belonging to a child of the husband and wife, and should be held by the husband in trust for the benefit of such child, forms no defense.

Nor is the fact that the husband procured the conveyance of such property to his wife for the purpose of securing a home for himself and family in case of future misfortunes, any defense to such an action.

Appeal from a judgment upon the report of a referee.

This action was brought by George W. Gray against Alexander F. Croquet, to recover possession of a house and lot of land in Brooklyn.

The complaint alleged that one Mary Olney was formerly seized and possessed of the premises in question. That, being so seized as aforesaid, the said Mary Olney, with her husband (George Olney), on or about March 1, 1859, conveyed the premises to one Mary Barlow. That on or about May 4, 1866, the said Mary Barlow conveyed the premises to one Isidore Cousselle. That on or about July 7, 1866, the said Isidore Cousselle conveyed the premises to the plaintiff;—who was seized of the premises in fee simple, and was entitled to the possession thereof. That the defendant was in possession of the said premises and unlawfully withheld possession thereof from the plaintiff, &c.

The answer, after putting in issue the conveyances
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from Mary Barlow to Cousselle and from Cousselle to the plaintiff alleged, in substance, the following facts :

That at the time of the alleged conveyance by Mary Barlow to Cousselle (May 4, 1866), and also at the time of the alleged conveyance from Cousselle to the plaintiff (July 7, 1866), the premises which were enclosed were in the actual possession of one Nicholas L. Barlow, claiming under a title adverse to that of the grantor in said pretended deed. That Nicholas L. Barlow is the owner and possessor of said described premises by the defendant as his tenant, and was still living, and was a necessary party to this action. That the premises, subject to a mortgage, were purchased by Nicholas L. Barlow, and the title thereto taken in the name of Mary Barlow, who was the wife of Nicholas L., as and for a family residence, settlement and homestead, and the whole purchase money was paid by Nicholas L. That it was agreed between Nicholas L. and Mary Barlow that they should live separate and apart from each other, and that Mary should deliver the possession of said premises to Nicholas L., and that he should hold and manage the same as a trustee for their infant child, and should collect the rents, issues and profits, and apply the net receipts to the maintenance and support of the child, and hold the property in trust for him. That in part performance of this agreement, Mary Barlow delivered the possession of said premises to her husband, who entered upon the performance and execution of the trust, and, as such trustee, rented the premises to the defendant, and had ever since held and occupied the premises as such trustee, adversely to Mary Barlow, and had executed the trust by the collection of rents, and management of the property, and the payment of the interest upon mortgage, and by applying the rents and profits to the support and maintenance of the *cestui que trust*. That Mary Barlow, subsequently to this agreement and to the delivery of such possession, eloped with a paramour, and fled from the country, and that subsequent to such elopement, Nicholas L. duly recovered judgment of absolute divorce, *a vinculo matrimonii*, in

the supreme court against Mary for adultery. That the conveyances alleged in the complaint, from Mary Barlow to Isidore Cousselle, and from Couselle to the plaintiff, were made to the plaintiff without consideration, and for the purpose of fraudulently avoiding and evading the agreement, entered into for the benefit of said infant child, and with notice of the agreement, and of the performance thereof, and the possession of Nicholas L. Barlow as trustee, by the defendant as his tenant. Wherefore defendant claimed that Nicholas L. Barlow, as such trustee, was a necessary and proper party to this action; and prayed judgment that the plaintiff might be decreed to execute a release to him as trustee for said infant child; and that he, and Mary Barlow, and Isidore Couselle, might be enjoined from making or setting up any claim to said premises, adverse to Nicholas L. Barlow as such trustee.

Upon these facts the answer claimed that Nicholas L. Barlow as such trustee, and Mary Barlow were necessary parties to the action, and prayed judgment that the plaintiff might be decreed to execute a release to Nicholas L. Barlow as trustee for the child; and that the plaintiffs Mary Barlow and Isidore Cousselle might be enjoined from setting up any claim to said premises adverse to Nicholas L. Barlow as such trustee.

The case was tried before the city judge of Brooklyn, who found in substance as follows:

That the plaintiff, by the conveyances set forth, became seized of the premises; and the defendant unlawfully detained them.

That the premises were purchased in the name of Mary Barlow, then the wife of Nicholas L. Barlow, and that the sum of \$1,000 was paid on the purchase money by said Nicholas L., the balance remaining on mortgage.

That sometime in July, 1860 or 1861, Nicholas L. Barlow made a verbal agreement with Mary, that the property was to be considered as belonging to their child Robert N., and that Nicholas L. was to act as trustee.

That Mary afterwards left her husband, who obtained a divorce from her in the supreme court.

That Nicholas L. Barlow had since claimed to hold and lease the premises under said verbal agreement.

And as matter of law, that the verbal agreement shown was wholly void and of no effect, and furnished no defense to the action, and that the plaintiff was entitled to judgment as claimed in the complaint.

Upon these findings judgment for the plaintiff was entered, from which the defendant appealed.

S. B. Brownell, for the appellant.—I. The findings show that at the time of the deeds from Mary Barlow to Cousselle, and from Cousselle to the plaintiff, the land was in actual possession of a person claiming under an adverse title. This rendered the deeds void under the revised statutes, part I., ch. 1, tit. 2, § 160; and part IV., ch. 1, tit. 6, § 6.

II. The findings show that the property was purchased by Nicholas L. Barlow, the consideration paid by him, and a title taken in Mary Barlow's name, "*for the purpose of securing a home for Mary Barlow and himself, in case of future misfortune in business.*" And that the said Mary Barlow declared this purpose and trust in writing, subscribed by her. Under the statute of frauds, this is a perfect and complete declaration of the trust, showing an outstanding title in Nicholas L. Barlow for his life, which would prevent the plaintiff's recovery; and as the plaintiff in ejectment must recover on his own good title, and not on any defect in defendant's title, the court below erred in denying defendant's motion to dismiss the plaintiff's complaint on this ground (*Swinburne v. Swinburne*, 28 *N. Y.*, 568; 4 *Kent*, 318, 305; *Lounsbury v. Purdy*, 18 *N. Y.*, 515; *Fisher v. Fields*, 10 *Johns.*, 496, 505).

III. The verbal agreement between Nicholas L. Barlow and Mary, found by the judge, that the property was to be considered as belonging to their infant child, and that Nicholas L. was to act as trustee, having (as the judge also found), been acted upon by him, by his holding and leasing the land as such trustee, for several years, and

actually giving leases, in writing and subscribed by him as such trustee, under one of which leases, unexpired, the defendant was in possession, was not void, and constitutes a defense to this action (*Swinburne v. Swinburne*, 28 *N. Y.*, 568; *Livingston v. Livingston*, 2 *Johns. Ch.*, 537). 1. Nicholas L. having assumed to act as trustee for his infant son, under said verbal agreement, could not, as against his son, or as against Mary, repudiate the trust, but was bound and liable to perform it (*Switzer v. Spiles*, 3 *Gilm.*, 529; 4 *Kent*, 321). He having assumed to so act, and having incurred such liability under the agreement, it would be a fraud upon him to allow Mary to set up or insist upon the statute of frauds; which is never allowed to be used to effect a fraud (*Ryan v. Dox*, 34 *N. Y.*, 306; *Dy-gert v. Reimerschneider*, 32 *N. Y.*, 629). And the plaintiff not having shown the payment of consideration, is a voluntary grantee, and stands in Mary Barlow's shoes (*Story Eq.*, § 1256). 2. Nicholas L., having, under the parol agreement, entered upon possession as trustee, and given a lease to the defendant, is liable to him, upon the implied covenants of quiet enjoyment and possession, and will therefore be left liable to the defendant for heavy damages, in case specific performance of that parol agreement is not decreed (*Lowry v. Tew*, 3 *Barb. Ch.*, 407). These two grounds, and the taking of possession, are, and any one of them is, sufficient to take the case out of the statute, and require the court to decree a specific performance.

Henry Whittaker, for the respondents.—I. The first point made by the appellant is, that the possession of Nicholas L. Barlow was such an adverse possession as rendered the deeds to Cousselle and to the plaintiff void under the provisions of the revised statutes relating to champerty. 1. All the authorities on the subject are clear that, in order to have that effect, the possession must be under a *bona fide* title, and that mere naked possession, or possession under a subordinate title, or one which does not embrace the whole fee, will not create a

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bar under the statute (Howard v. Howard, 17 Barb., 663; Learned v. Talmage, 26 Barb., 443, 454; Cary v. Goodman, 22 N. Y., 170; Fish v. Fish, 39 Barb., 513; Hoyt v. Dillon, 19 Barb., 644). 2. To bring the case within the statute, the adverse title must be a title at law. A mere possible equity, not reduced into judgment, cannot be of any avail to defeat a legal right.

II. The revised statutes provide that no "trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law or by a *deed or conveyance in writing* subscribed by the party creating" the trust. The idea that the incidental mention, in an allegation of cruel treatment, in a complaint for divorce, of the words set out in the appellant's second point is such a "*deed or conveyance*" as the statute contemplates, and that the signature to a subjoined affidavit of verification gives to the statement in a complaint, merely verified, but not subscribed by the party verifying, the effect of a conveyance, is preposterous. The cases cited by the appellant are all cases where the *proceeds* of property appropriated by equitable trustees, who had taken their title in their own names *without the knowledge or consent of their cestuis que trust*, were impounded in their hands.

III. The verbal agreement for a trust, even if proved, is unquestionably void. The only ground on which the appellant claims any validity for it is that there was a part performance. But the alleged performance by Nicholas L. Barlow, turns out, when examined, to be wholly visionary. At the time of the pretended agreement he was living on the premises with his wife, and there was no change of possession. The only *acts* done by Barlow have been to collect the income of the property, paying out of it only what he was obliged to pay for interest and repairs, and for one year's taxes, and to put the balance in his pocket. He has allowed the property to be sold for taxes, and procured his partner to buy in and hold the tax titles, and has kept no accounts as trustee. In all the

cases cited by the appellant something was *done* by the party seeking performance, in reliance on the agreement, from which the party from whom performance was sought had derived an absolute benefit which it would be inequitable for him to retain. In this case Nicholas L. Barlow has done nothing, but only derived benefit.

IV. Even if the pretended verbal agreement were valid as against Mary Barlow, it cannot affect the plaintiff, who is a *bona fide* purchaser without notice. The deed from Mary Barlow to Cousselle, and also the deed from Cousselle to the plaintiff, are each made for a consideration of \$4,000 recited to be paid; and this must be presumed to be so until the contrary is shown. There is not even a pretense of any evidence to show that such consideration was not paid, or that either Cousselle or the plaintiff had any notice of any such agreement as that alleged.

V. The pretended agreement would also be void for the reason that a wife cannot convey to her husband (*White v. Wager*, 25 N. Y., 328, and cases cited).

VI. An equitable right to a specific performance in favor of Nicholas L. Barlow, even if established, is no ground for a *counter-claim* in favor of the defendant (*Code*, § 150).

BY THE COURT.*—LOTT, P. J.—The plaintiff acquired the legal title to the premises in question under and by virtue of the deed to him from Isidore Cousselle. So far as appears from the case he was a *bona fide* purchaser for a valuable consideration, and there is no evidence that, at the time of the delivery of the said deed, the property was in possession of any person claiming under a *title* adverse to that of the grantor. It is shown that the said Nicholas L. Barlow himself bought the premises in 1856, of Mary Olney, then the owner thereof, and caused the conveyance thereof to be made to Mary Barlow, then his wife; and the title thereto is regularly deduced by a deed from her to Cousselle, and from him to the plaintiff. No other deed or conveyance is shown. There is, therefore, no

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ground or foundation for the position assumed by the defendant that there was any claim of title adverse to that of the grantor at the time either of the two last mentioned deeds was delivered to the grantees, or that either of them was selling a "pretended right" to the premises.

It follows that the plaintiff's deed entitled him to a recovery of the premises, unless the matters to which I shall hereafter refer are sufficient to defeat his claims to the possession thereof. It is found by the court below "that sometime in July, 1860, or 1861, said Nicholas Barlow made a verbal agreement with said Mary Barlow that the said property was to be considered as belonging to their child, Robert N. Barlow, and that said Nicholas L. Barlow was to act as trustee."

That agreement does not constitute a defense. It was made long after Mrs. Barlow acquired the title, and being verbal, it did not create a valid trust; and assuming, as the defendant's counsel insists, that such a trust as was thereby intended might be proved by any writing subscribed by Mrs. Barlow declaring the same, it is sufficient to say that there is no finding by the referee of any such declaration, nor is there any evidence thereof in the case. The statement made by her in the complaint in the action by her against her husband for a limited divorce referred to in the findings, conceding it to have been subscribed and sworn to by her, was not declaratory of such a trust. On the contrary, it shows that she, on a request made to her by her husband, on or about July 22, 1861, to sign a power of attorney to convey the premises to their son, refused to do it. It therefore, so far as it may be considered as having reference to the the matter at all, instead of establishing tends to prove the non-existence of such a trust.

Nor does the allegation in that statement that her husband, being unembarrassed in his pecuniary circumstances, purchased the property and caused it to be conveyed to her for the purpose of securing a home for her and himself, in case of future misfortune in business, prove any interest in him. It at most shows that the object in having the title to it taken in the name of the wife was to pro-

teet it against the claims of future creditors, and proves a clear intention on his part to vest it absolutely in her as her separate estate, without any interest therein or right thereto on his part, evidently contemplating then that he and his wife would continue to live together, and consequently that the securing a home to her would secure one to himself.

It was also claimed on the part of the defendant upon the trial that there had been a partial performance by Nicholas L. Barlow of the parol agreement, and that this fact constituted an equitable defense to the plaintiff's recovery.

All that is found by the court below tending to show such performance by him, is that he has "claimed to hold and lease said premises under said verbal agreement, and on the first day of May, 1866, by a lease in writing and subscribed by him as such trustee, he leased and rented said premises to the defendant for the term of one year at the annual rent of \$500."

No benefit is shown to have resulted to Mrs. Barlow from any of these acts, nor that a refusal by her to carry out the agreement will operate as a fraud on the husband. He has no personal interest in the execution of the trust intended to be created thereby, and no consideration whatever passed at the time the agreement was made. There is, therefore, no sufficient ground for extending the benefit of the equities of the doctrine of part performance of an agreement to the defendant in this case. It is indeed doubtful whether that doctrine can be applied to a case of trust;—see *Rathbone v. Rathbone*, 8 *Barb.*, 106.

The views above expressed lead us to the conclusion that none of the exceptions taken by the defendant on the trial or to the findings are well taken, and that the judgment of the city court is right, and should be affirmed.

Judgment affirmed with costs.

COLUMBIAN INSURANCE COMPANY *against*
STEVENS.*Court of Appeals; April, 1868.*

COSTS.—LIABILITY OF RECEIVER.

In an action prosecuted by a receiver to collect money to increase the fund in his hands, if the defendant prevails he is entitled to costs out of the fund, immediately. He is not required to accept a payment *pro rata* with the general creditors of the estate.

An order denying a motion that a receiver pay costs to which a party defending an action prosecuted by such receiver has become entitled, is not discretionary in such sense that it cannot be reviewed in the court of appeals.

Appeal from an order.

This action was commenced in the supreme court in the first district by the Columbian Insurance Company, on January 9, 1866. On the 23rd of the same month, and before the defendant appeared, receivers of the plaintiff's property were appointed, and the action was thereafter prosecuted by the receivers and their successor, to trial.

The action was an ordinary suit at law for the recovery of money only. On a trial before a referee, the defendants obtained a report upon which judgment was entered in their favor for their costs of suit.

The defendants then applied at special term for an order that the receiver pay such costs out of funds in his hands; showing by affidavit that he had funds in his possession as such receiver to a much larger amount. The nature of the receivership was not shown by the papers, nor did it appear to what extent there are claims of creditors or others to the funds in the hands of the receiver.

This motion was denied at the special term, and the order denying it was affirmed at the general term.

The defendants now appealed from the order of the general term to the court of appeals.

Ira D. Warren, for the appellants.—I. Under sections 317 and 321 of the code of procedure, the receiver, who became the owner of the cause of action after the suit was brought, became liable for the defendants' costs, in the same manner as if the action had been commenced by him. The defendant was therefore entitled to an order directing him to pay them (*Conger v. Hudson River R. R. Co.*, 7 *Abb. Pr.*, 255; *Colvard v. Oliver*, 7 *Wend.*, 497; *Carnahan v. Pond*, 15 *Abb. Pr.*, 283; *Camp v. Receivers of Niagara Bank*, 2 *Paige*, 283; *Jordan v. Sherwood*, 10 *Wend.*, 122; *Giles v. Halbut*, 12 *N. Y. [2 Kern.]*, 32; *Schoolcraft v. Lathrop*, 5 *Cow.*, 17). It seems clear that the receiver, being a "trustee of an express trust, expressly authorized by statute to sue," is bound to pay the defendants' costs out of the fund, unless the court direct him to pay them personally; and that the court is bound to order them paid out of the fund, as no misconduct is shown on the part of the receiver.

II. The receiver became the owner of this cause of action three weeks after it was commenced, and continued to prosecute it until a final determination of the action in favor of the defendant. Can a receiver, with plenty of funds in his hands, incur an obligation in his capacity as receiver, and then refuse to pay it out of the funds in his hands? Will the court permit a suit to be prosecuted against a party for the benefit of the fund in the receiver's hands, and, when it results in a failure, refuse to charge that fund with costs? We submit that, on a proper case being presented (as there was here), the defendants are entitled to the order of the court directing its officer having custody of the funds to pay the costs, as a matter of strict legal right; and that, where the receiver seeks by a suit to increase the funds in his hands, and fails, that fund should be charged with the costs; and that section

317 of the code makes them chargeable on the fund expressly, unless the court order the receiver to pay them personally.

III. The order is reviewable. 1. It was not discretionary. The receiver is an officer of the court; the fund of the plaintiff is, therefore, in the hands of the court. Can the court incur an obligation in the prosecution of a suit to increase the funds in its hands, and then, if it fails, say to its unfortunate victim, "It is discretionary with me whether I pay you or not, and I am discreet enough not to do it?" We submit this would be monstrous injustice and inequity, and that the supreme court has no such discretion; and that this court is the only court having the power to correct it. 2. This order is reviewable under subdivision 3 of section 11 of the code. It is a "summary application in an action after judgment," and it "affects a substantial right" (*Bank of Geneva v. Reynolds*, 33 N. Y., 160; *People v. New York Central R. R. Co.*, 29 *Id.*, 423).

Thomas G. Shearman, for the respondents.—I. The appeal should be dismissed. The order of the general term is not reviewable in this court. 1. Assuming that the court below had a power to make the order for which the defendants applied, it was certainly a matter within its discretion. The defendants had recovered judgment, and could have issued execution in the ordinary way. This was all to which they were entitled as a matter of *right*. It is not in the regular course of judicial business to grant an order directing the payment of a judgment. It may be that leave might have been required to issue an execution, the assets being in the hands of receivers; but this was not the relief for which the defendants applied. They asked for an order of a peculiar character, not to remove obstacles to the exercise of their absolute rights under the judgment, but to obtain a species of relief which never was obtainable under an ordinary money judgment as a matter of course. Such relief can only be asked as a *favor*, not as a *right*. 2. The decision of the court below

against an application for a favor is not appealable (*Spaulding v. Kingsland*, 1 *N. Y.* [1 *Comst.*], 426; *King v. Merchants' Exchange Co.*, 5 *N. Y.* [1 *Seld.*], 547; *Candee v. Lord*, 2 *N. Y.* [2 *Comst.*], 269; *Lansing v. Russell*, *Id.*, 563; *Briggs v. Vandenburg*, 22 *N. Y.*, 467). 3. The order applied for by the defendant was of much the same nature as an order requiring a receiver to file security for costs. It was designed to effect the same purpose *after* judgment, as an order of that kind would effect *before* a judgment. Such an order, it is now settled, is not appealable (*Briggs v. Vandenburg*, 22 *N. Y.*, 467).

II. The court below had no power to make the order sought by the defendants' attorneys. 1. The statute under which the receivers were appointed, and which governs them, and the court in directing them, expressly prohibits any preference given to judgments, except so far as they are liens upon real estate (2 *Rev. Stat.*, 470, § 79). And it is only by virtue of a *judgment* for these costs that they can recover at all. 2. The statute provides for *pro rata* payments in all cases, except those particularly mentioned therein. A judgment for costs is not one of the excepted and preferred claims (2 *Rev. Stat.*, 470, § 79).

III. There is no difference in this respect between the costs of an unsuccessful *defense*, and of an unsuccessful *prosecution*. In the former case, no one pretends, or has ever claimed, that the costs are to be paid in full, out of the assets of an insolvent corporation. But if the costs in either case are to be paid, the costs in both must be. 1. There is no difference made by the language of the statutes. 2. There is no difference in principle or upon grounds of expediency or public policy. The evil of an unjust defense is greater than that of an unjust claim, and it is of far more frequent occurrence.

IV. The rights of a defendant in this respect are abundantly protected by statutory provisions. 1. The defendants might have obtained security for costs (*Code*, § 317). 2. If the action has been carried on in bad faith, the receivers may be made personally liable (*Id.*).

V. If the defendants could not avail themselves of

these provisions, it must be for reasons which would make it no more than just that they should stand on the same footing as other creditors. They are not the only persons who suffer by the insolvency of the company. And there is no peculiar equity in their case which should give them a preference. Like many other defendants, they have defended a claim at some expense, and at the end find that the plaintiff is insolvent. It is hard, no doubt, but it is a hardship of every-day occurrence; and often occurs where a claim is unreasonably pressed, which is not the case here. This suit has been maintained in good faith, and on reasonable grounds. Part of the claim (the notes) has been settled.

VI. It has been attempted by the defendants' counsel to compare this claim to one founded upon an express contract with the receivers; and it was asked whether they could drive their clerks to accept a *pro rata* allowance with creditors of the company. The answer to this is easy. 1. A claim for costs acquired in hostility to the receivers is not founded upon any contract with them, express or implied. 2. If there was any contract in the case, it was with the *company*, not with the receivers. The action went on in the name of the company. If the defendants desired to establish any claim against the receivers, as distinguished from the company, they should have compelled a substitution of the receivers as parties plaintiff. 3. A clerk who continued to serve the *company* after the appointment of the receivers, and should make out his bills to the company only, would have to take his pay in the same manner as any other creditor. The reason why one who serves the receivers may recover his compensation in full, is, that he serves the court, of which the receivers are agents, and acts for the benefit of the creditors; whereas one who serves the *company*, acts for the benefit of the stockholders.

VII. It would be peculiarly unjust to the other creditors of the company to allow a preference in this case for the allowance of \$800, that being not so much a matter of strict debt and an absolute right, as a favor granted to

the defendants by the court, with a view to increase their *pro rata* allowance, as has been done in other cases.

WOODRUFF, J.—The right of the defendants to have judgment for their costs in such an action as the present, brought against them for the recovery of money only, is absolute; as well by the law before, as by that since the code of procedure. There is no claim, nor ground of claim, that the allowance of costs in the action was discretionary.

The liability of the receiver, in whom the alleged cause of action became vested after the summons herein was served, and by whom the action was prosecuted, is made, by section 321 of the code, the same as if he had caused himself to be made a party.

The questions here are, therefore :

1. In an action by a receiver, for the collection of a money demand, instituted or carried on for the enhancement of the fund, for the benefit of those to whom it is ultimately to be paid, is the defendant entitled to costs to be paid to him immediately, or must he stand as a general creditor to await the final administration, and receive only, as the case may be, his distributive share of the fund, *pro rata*, with those for whose benefit he has been subjected to a groundless litigation?

2. Is the question stated addressed to the discretion of the court, in such sense that no appeal lies to this tribunal from the decision made below?

It was conceded on the argument that the costs in question are chargeable upon, and are to be collected out of the fund; this could not well be denied; and yet in a case in which it does not appear by anything stated in the papers that there are other claims on the fund of any sort, except the interests of the stockholders of the company, it would seem to follow, as of course, that the receiver should have been directed to pay these costs. Such an order is the appropriate mode of reaching funds in the receiver's hands. He not being in form a party to the action, no execution could reach the property he holds; and being the

custodian of the fund as an officer of the court, he is subject to immediate direction to pay it to the party entitled.

If it be assumed that the company was insolvent, and that the funds which the receiver holds or collects may not prove sufficient to satisfy all the creditors of the company, this does not, in my opinion, upon clear and just rules governing the subject, impair the defendant's right to be paid in full; the fund being confessedly sufficient.

The receiver is, *pro hac vice*, the representative of the company, its creditors and stockholders. The action is prosecuted for the increase of a fund which is to be paid to them. It is not according to any rule of justice or equity towards third parties, that actions like the present should be prosecuted by the company or such representative, otherwise than at the expense and risk of the fund which it is sought thereby to increase.

In my opinion the right of the defendant to this protection and indemnity against groundless prosecution is clear; and it is not necessary to invoke section 317 of the code for its maintainance, further than to say that its provisions warrant the charge of the costs upon the defendants; and that such charge should be absolute, and prior to the claims of those for whose benefit this action is prosecuted is the rules of equity. Whether section 317 imperatively entitles the prevailing party to such priority of payment in all cases mentioned in that section, it is unnecessary in this case to decide.

If the views thus expressed are in conformity with established rules relating to the subject, as they are in my judgment conformable to what is obviously just, then it was not a matter of discretion to refuse the order sought.

The rule was applied by Chancellor WALWORTH to a case like the present, in which it did appear that the corporation was insolvent (*Camp v. Receiver of Niagara Bank*, 2 *Paige*, 283), where the receivers continued the prosecution of a suit at law which was at issue before their appointment.

In giving his opinion he says, "If the receivers did not think it for the interest of the creditors to run the risk of having the costs charged upon the fund, they should have abandoned the suit, and then the petitioner would only have been entitled to a share ratably with the other creditors. The petitioner is entitled to his costs down to the time of the nonsuit, to be paid out of the funds in the hands of the receivers,"—and he made an order to that effect. In my opinion the scheme and principle proposed by the chapter of the code in relation to costs is, that where costs are allowed, they should be paid by the fund or a party who would be benefited by a counter judgment; and I think that this case is not within any exception to the rule.

To the suggestion that the statute (2 *Rev. Stat.*, 470, § 79), will not permit the reference sought, it must suffice to say that it is not sought to give a preference to the defendants in the payment of a debt of the company as such; but only to require the fund to bear and pay an expense incurred for its own benefit or increase.

Nor is it any answer to say that defendants often fail to collect their costs of a successful defense when the plaintiff is insolvent, and that therefore the order made below works no unusual hardship. Where the plaintiff has funds, the defendant is always entitled to collect, and does collect his costs. Now the beneficial party plaintiff has funds.

It may be said that this rule places it in the power of the receivers to waste the whole of the assets in their hands in groundless litigation, and successful defendants are paid their costs while creditors may get nothing. On that subject I answer,—when the receiver's accounts are passed, there will be abundant opportunity for creditors and others to inquire whether he has acted with due regard to their interests; and the right to require that he personally pay costs which he ought not to have incurred is not confined to the parties to the action (*Colvard v. Oliver*, 7 *Wend.*, 497).

The question whether an unreasonable allowance was
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or was not made to the defendant, is not before us, we must assume that the case called for the allowance made.

The order appealed from should be reversed.

All the judges concurred.

Order reversed.

GREENLEAF *against* MUMFORD.

Supreme Court, First District; General Term, Apr., 1868.

ACTION IN AID OF ATTACHMENT.—LEVY ON BANK DEPOSIT.

A warrant of attachment having been issued against M., the sheriff claimed to levy it upon money deposited in bank alleged to belong to M.; but the bank refused to pay over the deposit, under the attachment, for the reason that the money had in fact been deposited by O., who had drawn checks against it which the bank had certified. It appearing that O. still held the checks undorsed, the attaching creditors brought an action to prevent O. from endorsing and the bank from paying them, and to procure the fund to be applied to discharge their demand against M.

Held, that the action could not be maintained, even if the money was the property of M., and was deposited in the name of O. for the purpose of protecting it from attachment. Whatever might be the rights of creditors holding *executions* unsatisfied, to reach the fund, it could not be reached by an *attachment* against M., for the reason that the deposit in the name of O. did not create any debt between the bank and M. And the fund, not being liable to attachment as a debt due to M., by the provisions of the code, could not be subjected to such attachment by a decree in equity.

Appeal from a judgment.

The plaintiffs in this action previously brought an action against Peter R. Mumford, one of the present defend-

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ants, in which they obtained an attachment. The sheriff attempted to levy this attachment upon money upon deposit in the Nassau Bank, in New York city, supposed to belong to Mumford. But it proved that the money in question had been deposited in the name of one Oakey, who had also drawn checks against the deposit, payable to his own order, and had got them certified by the bank, and left them, unindorsed, in a box kept by him at the bank. Both Oakey and the bank denied that the money was subject to attachment as the property of Mumford.

The plaintiffs then brought the present action against Mumford, Oakey, the Bank, and one Speyers (who claimed as assignee of Mumford under an assignment made after the levy), seeking to have any payment of the deposit by the bank upon Oakey's checks restrained, and to have the impediments to the attachment removed and the fund declared subject to it.

Upon the trial the court found that the sum deposited by Oakey in the Nassau Bank, was really deposited for the use and benefit of Mumford, and belonged to Mumford; that the drawing of the checks and getting them certified by Oakey, was a contrivance on the part of Mumford and Oakey to screen the money from the creditors of Mumford, and to prevent or defeat the levy of an attachment or execution thereon; and that the levy was duly made; and that the plaintiffs were entitled to satisfaction of their judgment out of the fund.

From the judgment in favor of the plaintiffs, upon these findings, the defendant Speyers now appealed.

Charles A. Rapallo, for the appellant.

David Dudley Field, for the respondent.

BY THE COURT.*—SUTHERLAND, J.—The exceptions to the conclusions of law, that the service of the warrant of attachment on the Nassau Bank constituted a levy on the fund in question; that the money deposited by Oakey in

* Present—BARNARD, SUTHERLAND, and INGRAHAM, JJ.

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the Nassau Bank was bound by the levy made under the attachment ; and that the plaintiffs were entitled to judgment, were all well taken. These conclusions of law were all plainly erroneous, for the reason that they all assume that the sum of \$53,000 deposited by Oakey in the Nassau Bank, for which the bank had given him credit, and for which the bank had certified checks drawn by Oakey against the fund, was capable of being attached as a debt due or owing from or by the bank of the defendant Mumford. In other words, these conclusions of law and the judgment quietly assume against the defendant Speyers the main point in the case ; and erroneously assume it ; for the facts found show that there was no debt due or owing from the bank to Mumford on account of the \$53,000, or his deposit, when the attachment is alleged to have been served.

The main question in this case is not as to the regularity or sufficiency of service, or attempted service, of the attachment ; but the main question is, do the facts found show that there was any debt, fund, or thing which was or could be attached or levied on ? Plainly they do not. The transaction between Mumford and Oakey as to the \$53,000, however fraudulent and void as to the plaintiffs and other creditors of Mumford, was valid as between Mumford and Oakey ; and whatever the right of the plaintiffs and other creditors, with judgments and executions returned *nulla bona*, to have the transaction declared fraudulent and void, and reach the fund in equity, the plaintiffs could not reach the fund with their attachment in their action against Mumford for their debt. The plaintiffs could only attach the fund as a debt of the bank's to Mumford ; but the facts found in this case show that the debt arising from the deposit in the bank by Oakey and the credit given by the bank to Oakey, was a debt of the bank's to Oakey, and not a debt of the bank's to Mumford. To say that the fund deposited in the bank by Oakey, and for which the bank had given him credit, and on account of which the bank had certified the checks of Oakey drawn against the same, could be reached by attachment in the action of the plaintiffs against Mumford

for their debt; or to say that the fund was attached in that action, because the court below found in this action that the transaction between Mumford and Oakey was fraudulent and void, as to the plaintiffs and other creditors of Mumford; and that the fund so deposited by Oakey in equity belonged to the creditors of Mumford; is to say that you can give the finding and judgment in this action (commenced before the plaintiffs had got a judgment for their debt), on the question of fraud, an *ex post facto* operation, and that you can by this *ex post facto* operation, support the attachment proceedings in the first action, and the lien and preference claimed by the plaintiffs to have been acquired under or by the attachment proceedings in the first action.

Why, the very claim of the counsel for the plaintiffs, that this action is an action to subject the fund in question to the attachment in the first action, involves the admission that it was not and could not be attached in the first action, and that the plaintiffs did not and could not, by the attachment proceedings in the first action, get any lien on the fund, and that they did not, and could not, by their attachment proceedings in the first action, obtain any right or preference to have their debt paid in full out of the fund. And a claim that the fund was attached in the first action, because the court below found, in this action, that the transaction between Mumford and Oakey was fraudulent and void as to Mumford's creditors, involves the same admission, that the fund was not attachable in the first action.

There is really no such thing as an action, either by the creditor or the sheriff, to subject chattels or debts to an attachment issued under the code. It is the code which subjects property to attachment. Who ever heard, until recently, of an action either by a sheriff or creditor in aid of the code, to subject property to attachment—to make that attachable under the code which is not attachable under the code?

In the case of *Kelly v. Lane*, I dismissed the complaint at special term, on the ground that the *sheriff* could not

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maintain such an action. There was an appeal, and it was reversed by the general term. For a more full discussion of the question, I refer to my dissenting opinion in that case, at general term (*Kelly v. Lane*, 42 *Barb.*, 610). I think I may say that the views expressed in my dissenting opinion in *Kelly v. Lane*, were fully and unequivocally sustained by the court of appeals in *Lawrence v. Bank of the Republic* (35 *N. Y.*, 320). True, perhaps I did not say in *Kelly v. Lane*, either at special or general term, that a *creditor* could not bring such an action, for I had no occasion to say it, but my reasoning applied equally to such an action by a creditor.

Judge MORGAN, in his opinion in the court of appeals, in *Lawrence v. Bank of the Republic*, does not say in words that a creditor could not maintain such an action; but as the question in the case arose in the defendant's answer setting up the attachment proceedings by the defendant, the question whether either the defendant or the sheriff could have maintained such an action, was before the court. It does not appear that there had been a suggestion by counsel, that even if the sheriff could not have maintained such an action, the defendant could. It was natural, therefore, that the judge should in words limit his opinion to the question which had been discussed, whether the sheriff could have maintained such an action. I venture to say that the learned judge and the counsel assumed if the sheriff could not have maintained such an action, the defendant could not.

I dismissed the complaint in *Merchants' & Traders' Bank v. Dakin*, at special term, on the ground (see 28 *How. Pr.*, 510), that the plaintiff, as a judgment creditor, with an execution out and not returned *nulla bona*, could not maintain the action; the bond and mortgage sought to be reached and applied to the payment of the judgment being choses in action, or equitable assets. There had been an attachment issued in the action in which the judgment was obtained, under which attachment it was claimed that the bond and mortgage had been attached as a debt due or owing from the defendant Miller to the de-

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fendant Dakin. I dismissed the complaint, irrespective of the question whether the attachment proceedings did or could aid the plaintiff in maintaining the action. I assumed that the attachment proceedings did not enable the plaintiff to maintain the action. There was an appeal; and it seems (see 33 *How. Pr.*, 316), that the general term, instead of passing upon the point upon which the complaint was dismissed at special term, affirmed the judgment of dismissal on the ground, substantially, that though the sheriff might have maintained an action to subject the bond and mortgage to the attachment, notwithstanding their formal and alleged fraudulent assignment by Dakin to the defendant Jewell before the attachment proceedings, yet that the plaintiff, the creditor, could not.

Lawrence v. Bank of the Republic was decided by the court of appeals at the March term, 1866. *Merchants' & Traders' Bank v. Dakin* was heard by the general term, at the January general term, 1867.

It is certainly singular that Justice LEONARD, who wrote the elaborate opinion of the general term in the last mentioned case should be reported as having concurred in Judge MORGAN's opinion in the court of appeals in *Lawrence v. Bank of the Republic*.

If the moneys deposited by Oakey in the National Bank were regularly and properly attached, in the action by plaintiffs to recover a judgment for their debt, either as the moneys of Mumford or as a debt of the bank's to him, there was no necessity or occasion for this action; and if they were not so attached in the first action, this action could not be maintained in aid of the attachment proceedings, or to declare or create a lien on the fund, when none was acquired by the attachment proceedings. This action was commenced before the plaintiffs had obtained judgment in their action in which the attachment was issued, and after the assignment by Mumford to the defendant Speyers, for the benefit of all of Mumford's creditors, equally and without preferences.

The purpose of this action was to have the transfer of

the \$53,000 by Mumford to Oakey, and the deposit of it by Oakey to his own credit in the Nassau Bank, judicially declared fraudulent and void as to the plaintiffs, as attachment creditors of Mumford; and to have it further judicially declared that the moneys had been attached in the action in which the attachment had been issued, as the moneys of Mumford, so that the plaintiffs might obtain the further judicial declaration, and a judgment, in this action, that they should be paid their debt in full out of these moneys, instead of taking their share under the assignment with other creditors, whose debts were equally meritorious with their own.

Now it appears to me that, in view of the maxim that "equality is equity," and in view of the circumstance that the very institution of this action must be regarded as a confession that the moneys have not been attached, it must have required great courage, or a great confusion of ideas, and a gross misapplication of analogies, to bring the action.

Upon what rests the power of the court below to find, as was found in this case, that the service of the attachment was a good and valid service, and that the money in question was bound by the levy under the attachment, and "that the same has been properly subjected to the execution issued on the judgment" entered in the attachment action? The attachment proceeding was a statutory proceeding under the code, and was regulated by the code. Upon what rests the power of a court of equity to interfere with it—to declare moneys to have been attached which have not been attached—a levy to have been made and a lien acquired, when in fact there was neither a levy nor a lien—to declare that to have been done and that to have existed, which never was done and never did exist—to declare a fiction to be a fact?

There are fictions of law—but the maxim is "*in fictione juris semper subsistit æquitas*."

"Equality is equity," and we are not called upon in this case to strain a point to initiate a principle, or to create a precedent, that the plaintiffs may be paid their debt

in full at the expense of other creditors equally meritorious. My excuse for this rather elaborate opinion on a question which I deem so plain, must rest on the cases which have been referred to, and on the fact that I am writing this opinion upon a reargument ordered in this case, after judgment of affirmance by the general term.

As the answer of the defendant Speyers, the assignee, asks for affirmative relief, and as the necessary parties appear to be before the court, and as there is not a doubt as to the conclusion of the court below, that the transaction between Mumford and Oakey, and the deposit of the \$53,000 by Oakey in his own name was fraudulent and void as to the plaintiffs and other creditors, I think we can and should declare and adjudge, that the defendant Speyers, as assignee, was and is entitled to the whole fund in question (which it seems was deposited in the New York Life Insurance and Trust Company by order of the court), to be distributed under and according to the assignment, and that it be paid over to him for such distribution, leaving him to take such action on or as to the bond, which was given for the repayment of so much of the fund, with interest, costs, and damages, as was paid to the sheriff by order of the court in satisfaction of the plaintiffs' execution, as he shall be advised to take; and I think that the judgment appealed from should be reversed, and the plaintiffs' complaint dismissed with costs.

BARNARD, P. J., dissented.

Judgment reversed.

BRYANT *against* BRYANT.

New York Superior Court; General Term, December, 1867.

AMENDMENT.—NOTICE OF APPEAL.

The court at special term has not power to allow an amendment of a notice of appeal, the effect of which is not merely to correct a mistake, but to enlarge the time allowed by the code for taking the appeal.

Appeal from an order.

This action was tried in October, 1864. On the 25th of that month, the justice who tried the cause made an order returnable before himself, November 2nd, for a motion for a new trial on his minutes. On the return of the order, the plaintiff objected to the motion, on the grounds: 1. That the stenographer's minutes were not the judge's minutes; and 2. That there was not an order of the general term extending the trial term to November 2. The justice overruled the objections, and denied the motion for a new trial. The order denying the motion for a new trial was entered November 12.

Subsequently, the plaintiff applied to the justice for a resettlement of the order of November 12, so that it might embrace the objections to his entertaining such motion. The motion for a resettlement was denied, and an order to that effect entered January 6, 1865.

From this last mentioned order the plaintiff appealed, and the same was modified by the general term, December 30, 1865—as was also the order of November 12, 1864—by striking out “12th” and inserting “2nd” in its place.

On January 7, 1867, the defendant served a notice of appeal “from the order of this court, made January 6,

1865, as modified by the general term by order made December 30, 1865."

On November 7, 1867, the appeal coming on for argument, and it appearing that the appeal was from the order of January 6, 1865, instead of the order of November 12, 1864, the case was ordered to stand over, to enable the defendants to apply to the special term for a correction of the notice of appeal.

A motion was thereupon made at special term, founded upon an affidavit of the defendant's attorney "that the notice of appeal contained the words 'January 6, 1865,' by mistake, instead of the words and figures 'November 12, 1864;'" that the said mistake arose from deponent reading said modifying order of December 30, 1865, as though it merely modified the order of January 6, instead of the order of November 12, whereas both said orders were modified in one and the same folio, and by supposing that the order of January 6 was the order denying the motion for a new trial;" and that the defendants appealed in good faith from what the attorney believed to be the order for a new trial.

The motion to correct the notice of appeal was denied, and the defendants now appealed to the general term.

G. W. Cotterill, for the appellants.

John Graham, for the respondent.

BY THE COURT.—MONELL, J.—No opinion seems to have been written at the special term—but it is understood that the motion was denied on the ground that the justice conceived he had no power to allow the correction to be made, inasmuch as the notice of appeal sought to be amended correctly referred to an order in the cause which had been entered on the day mentioned in the notice; and that, therefore, to amend the notice by inserting therein the date of another and different order, would be virtually allowing an appeal from the latter order after the time for appealing therefrom had expired.

I think the decision was correct. In the case of *Fry v.*

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Bennett in this court (16 *How. Pr.*, 385), the power of the court to allow an amendment of a notice of appeal, the effect of which would be, not merely to correct a mistake, but to enlarge the time for appealing, in violation of the provisions of the code, was fully discussed, and all the cases examined. And it was agreed by all the judges that the amendment could not be allowed. I have no doubt the defendant's attorney intended to appeal from the order of November 12; but unfortunately his notice recited the date of another and different order, which had actually been entered on the day of its date. To allow an amendment now, would be in fact allowing an appeal long after the time for appealing had expired, which is expressly forbidden by the code.

I think the order appealed from should be affirmed.

Order affirmed, with costs.

COIT *against* PLANER.

New York Superior Court; General Term, May, 1868.

ACTION FOR USE AND OCCUPATION.—COMPLAINT.

What averments in a complaint are sufficient to show a cause of action for use and occupation.

It is a sound principle that the action for use and occupation is founded upon contract, and lies only when the relation of landlord and tenant exists.

But a contract, in order to sustain the action need not be express; it may be implied from circumstances,—*e. g.*, from the facts that the plaintiff notified the defendant he would charge defendant a certain rent for the premises, and the defendant, under such notice, entered upon, and used them.

Possession of leased premises, the property of the plaintiff, in an action for use and occupation, is sufficient evidence of an assignment of them by the

original lessee to the defendant, to enable the owner to recover against the defendant directly.

Appeal from a judgment at special term.

The complaint in this action set forth that on September 10, 1864, Louis Planer and Joseph Kayser were the tenants, and in possession of certain premises in the city of New York, belonging to the plaintiffs, known as Nos. 85, 87, and 89 Elizabeth-street, and on that day agreed with plaintiff, that if he would erect and build an additional story on a certain building on said premises, for their use and occupation, they (Planer and Kayser), would pay the plaintiff an annual rent of \$150 therefor, payable quarterly in advance;—that the plaintiff did erect said additional story, and Planer and Kayser entered into possession thereof, on or about the first day of January, 1864, and have paid the plaintiff for the rent, use, and occupation thereof, up to February 1, 1866, but refused and declined to enter into any written agreement with the plaintiff for the letting or hiring of said additional story. That some time during the quarter ending on February 1, 1866, Planer and Kayser assigned and transferred to the defendants, Planer, Bramsdorf & Vail, all their right, title, and interest, in the said premises, 85, 87 and 89 Elizabeth-street, including the additional story above mentioned, and defendants entered into, and ever since have been, and now are in the full use and occupation and enjoyment thereof; and that \$75 is a fair and reasonable rent and sum for the use and occupation of said additional story for three months, ending May 1, 1866. The plaintiff further stated that he notified the defendants that if they used and occupied the additional story the rent of the same for the year commencing on May 1, 1866, would be \$400, payable quarterly in advance; which rent plaintiff averred is a fair and reasonable rent and sum for the occupation of the additional story; that said defendants have not paid the sum of \$75 nor \$400, or any part thereof. The complaint therefore demanded judgment for \$475 and costs.

The defendants in their answer denied that some time

during the quarter ending February 1, 1866, referred to in the complaint, or at any other time, Planer and Kayser assigned or transferred to the defendants all their right, title, and interest in said premises.

The cause was tried before Justice BARBOUR, without a jury. Upon the trial, without evidence upon either side, the defendants moved the court to discharge the complaint, upon the ground that it did not state facts sufficient to constitute a course of action; which motion was denied, and the defendants excepted. The plaintiffs then moved the court for judgment on the pleadings. The court granted the motion, and granted judgment for the plaintiff; and the defendants excepted. Judgment was entered accordingly; from which the defendants appealed.

A. C. Morris, for the appellants.—I. The court erred in rendering judgment in favor of the plaintiff upon the pleadings. The only possible claim the plaintiffs show against the defendants is as assignees of Planer and Kayser. The complaint alleges a hiring by the plaintiffs to Planer and Kayser at the annual rent of \$150, and that some time during the quarter ending February 1, 1866, Planer and Kayser "*assigned and transferred to the above named defendants all their right, title and interest in the said premises, 85, 87 and 89 Elizabeth-street, including the said additional story above named, and said defendants entered into and ever since have been and now are in the full use, enjoyment and occupation thereof.*" This averment, is substantially that the defendants entered into the use and occupation of the premises as the assignees of Planer and Kayser. And the averment is fully denied by the answer.

II. The learned judge who presided at the trial held that the words of the complaint "*that the defendants entered into, and ever since have been, and now are in the full use, enjoyment, and occupation thereof,*" were to be regarded as a distinct allegation, independent of and not qualified by what precedes them, and that as the pleadings admitted this occupation, &c., the plaintiff was enti-

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med to judgment. But even under this construction, the ruling of the judge was erroneous; for the simple reason that to authorize an action for use and occupation, the conventional relation of landlord and tenant must exist between the parties. Of this there is no pretense, in the present complaint, except so far as is to be deduced from the hiring to Planer and Kayser, and the transfer of their interest to the defendants (*Sylvester v. Ralston*, 31 *Barb.*, 286; *Croswell v. Cram*, 7 *Id.*, 192; *Osgood v. Dewey*, 13 *Johns.*, 240; *Hall v. Southmayd*, 15 *Barb.*, 36; *Tayl. Landl. & T.*, § 636).

Alfred Roe, for the respondents.—I. The pleadings admit the ownership by plaintiff of the premises described in the complaint; that the defendants entered into, used and occupied the same; and the value of such use and occupation. This is sufficient to entitle the plaintiff to recover (*Tayl. Landl. & T.*, 461, 466, 476; *Osgood v. Dewey*, 13 *Johns.*, 240; *Peckham v. Leary*, 6 *Duer*, 494; *Bedford v. Terhune*, 30 *N. Y.*, 453).

II. As to the last year of the term sued for—the relation of landlord and tenant did actually exist by express contract. Notice was given to the defendants of what the rent would be, and by retaining possession and using and occupying the premises, after such notice, they became tenants of the owner, the plaintiff (*Tayl. Landl. & T.*, 463; *Peckham v. Leary*, 6 *Duer*, 494; *Despard v. Walbridge*, 15 *N. Y.*, 374).

BY THE COURT.*—GARVIN, J.—This action is brought to recover a reasonable compensation for the use and occupation of an additional story used by defendants, from February 1, 1866, up to and including May 1, 1867.

The complaint alleges plaintiffs' ownership; notice to the defendants that if they used the premises he would charge them \$400 per year therefor; that the defendants entered into possession; use and occupation by defendants for fifteen months; that the amount claimed is a

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reasonable sum ; and that, during the quarter preceding May 1, 1866, the said Planer and Kayser assigned and transferred to the defendants all their right, title, and interest in the premises in Elizabeth-street ; that Planer and Kayser refused to enter into any written agreement for the letting or hiring of the additional story ; and that the rent is still unpaid.

All these allegations except the assignment are admitted, for want of any denial in the answer.

That such a complaint contains facts sufficient to constitute a cause of action for use and occupation for the one year, will hardly be denied. In the absence of any written or verbal agreement for the duration of their term, Planer & Kayser were only tenants of the additional story from year to year ; and their term expired May 1, 1866 (1 *Rev. Stat.*, 744, § 1) ; thus showing a clear cause of action against the defendants for use and occupation of the premises for the year beginning in May, 1866. After that date, the defendants could not have been under-tenants of Planer and Kayser—their term expired before the defendants' commenced. If not under-tenants, the defendants are liable to the plaintiffs as owners (*Wood v. Wilcox*, 1 *Den.*, 38 ; 7 *Hill*, 83 ; 1 *Rev. Stat.*, 748, § 26). The use and occupation of the premises would imply a promise to pay what they were reasonably worth, or, in other words, a reasonable compensation.

But it is objected that an action on the case for use and occupation is founded upon contract, and lies only when the relation of landlord and tenant exists. This is a sound principle, and rests not only upon authority but upon the statute. Such contract need not, however, be express—it may be implied from circumstances (*Despard v. Walbridge*, 15 *N. Y.*, 374 ; 13 *Johns.*, 297, 240 ; 1 *Wend.*, 134 ; 17 *Barb.*, 149).

It is admitted that the defendants went into possession, occupied and enjoyed the use of the premises for fifteen months. They were notified what the rent would be if they used the premises. They deprived the plaintiffs of the use and occupation of them, and took the benefit and had

the advantage. Upon these facts we are bound to infer an agreement, and promise to pay a reasonable compensation. The promise or contract having been made out, the relation of landlord and tenant follows.

This disposes of the defense to plaintiffs' claim for the year preceding May 1, 1866, but leaves the question of compensation for the last quarter preceding that period undisposed of. It is averred that there was an assignment and transfer to the defendants of all the interest of Planer and Kayser to the additional story; that it was occupied by the defendants, *who went into possession*. The fact of the possession is admitted, and this is evidence of an assignment in the first instance. This principle has been held so often that it hardly needs the citation of authority to sustain it. It is broadly laid down in *Anthony v. Wheeler* (9 *Cow.*, 88), *Williams v. Woodward* (2 *Wend.*, 487), *Quackenboss v. Clark* (12 *Id.*, 555), and approved in *Bedford v. Terhune* (30 *N. Y.*, 453). All the facts are admitted which are required to make out the plaintiffs' case. No one thing is denied, except the assignment; and the occupation proves that.

I am at a loss to see how the answer can avail the defendants, even if it is conceded Planer had an interest to assign. The rule implies an assignment from the occupation and possession, when proved;—why does not the same implication result from the admission? It was the duty of the defendants to have met the case stated in the complaint, by their answer and proofs. SAVAGE, J., says (in *Quackenboss v. Clark*), the fact of assignment is a transaction between the defendants and lessees, of which the plaintiff is not cognizant; the defendants are; there is no hardship in concluding them by their possession, “unless they disclose the true state of their title. They might have set up and shown they were under-tenants; they might have set up and proved the term had expired before they went into possession. These facts would have disproved an assignment, which, without such proof, would be inferred from the fact of possession.”

The conceded facts fix the liability of the defendants

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for the use of the premises, and the plaintiffs' right of action for the quarter's rent of the year (30 N. Y., 458). In every aspect in which we have been able to view this case, though one of some difficulty, we think the judgment should be affirmed.

Judgment affirmed, with costs.

PLANT *against* SCHUYLER.

New York Superior Court ; Special Term, December, 1867.

ANSWER.—SUFFICIENCY OF DEFENSES TO NOTE.

An answer to a complaint on a promissory note, which sets up as a defense that the note was made as a memorandum note, and was not to be negotiated, is frivolous.

A denial, in an answer to a complaint upon a promissory note, that the plaintiff is a *bona fide* holder of the note, or that he received the same in course of business, or that he advanced any new consideration therefor, is insufficient.

Application for judgment on the pleadings.

This action was brought by Edwin E. Plant against Spencer D. Schuyler and James Plant, to recover upon a promissory note, made by defendant Schuyler, dated March 16, 1867, to the order of James Plant, for \$500, payable July 15, 1867, and alleged to have been afterwards, and before the same became due, indorsed by James Plant and transferred to the plaintiff, who claimed to be the lawful owner and holder thereof.

Demand and notice, &c., were also averred in the complaint.

The answer of the defendant Schuyler was as follows :

“The said defendant, Spencer D. Schuyler, for answer to the complaint in this action, says—*First*. That the said James Plant, the payee of said note, at the time of the making of the said note was justly indebted to one George S. Stringfield, in the sum of \$200, and being justly indebted therefor, promised to pay the same on request; and that, though often requested, the said James Plant never paid the same, nor any part thereof; and that before the commencement of this action the said Stringfield duly sold, assigned and transferred the said claim or demand to this defendant, and that he is the owner and holder thereof; and defendant alleges upon his information and belief, that the plaintiff is not a *bona fide* holder of said note; that he did not receive the same in the usual course of business, nor advance any new or full consideration therefor, and received the same with full knowledge of the defendant's set-off to the same, and for the purpose of depriving defendant thereof; and that he is not the real party in interest in said matter, but prosecutes the same for the benefit of the said James Plant.

Second. The said defendant, further answering the complaint, alleges that at the time of the making of said note, the said payee, James Plant, and this defendant, were stockholders in the American Bolt & Rivet Company, a corporation organized under the laws of the State of New York, and the said James Plant at the date of said note executed to this defendant a nominal transfer of his said stock, for the purpose of enabling this defendant to exercise a greater control and influence in the said corporation for the use and benefit of this defendant and the said James Plant, stockholder, as aforesaid; and the said note mentioned and described in the complaint was executed and delivered to the said James Plant as a memorandum note, and not for the purpose of negotiating the same, by the said James Plant, and it was expressly understood and agreed that the defendant was to have the right and privilege of returning the said stock to the said James Plant, and which he is ready and willing to do, upon the return of the said note, pursuant to the said

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agreement and understanding; and defendant alleges, upon his information and belief, that the plaintiff is not a *bona fide* holder of the said note; that he did not take the same in the ordinary course of business, nor advance any new or full consideration therefor, and that he received the same with knowledge of the circumstances under which the same was made as aforesaid; and that he is not in fact the owner of said note, but is prosecuting the same for the benefit of the said James Plant; and defendant denies each and every allegation contained in the said complaint, inconsistent with the foregoing answer, and demands judgment that the said complaint be dismissed, with costs."

McCUNN, J.—The answer does not deny the making of the note for value, its terms, its indorsement and delivery to the plaintiff before it became due, &c.

In the second part of the answer, for the purpose, as is supposed, of showing a want of consideration, the defendant has pleaded a number of "understandings" about stock, &c., but what connection they had with the making and delivery of the note does not appear.

Indeed, if anything can be inferred from the pleaded matter, it is that the note was given for the assignment of stock which was *beneficial to defendant Schuyler*, and which therefore constituted a consideration sufficient to hold the note.

The allegations in the answer that the note was not to be negotiated, and that defendant should have the right of returning said stock, &c., are frivolous, because the terms of the note are admitted in the answer, from which the court can see it was negotiable; and no agreement that James Plant should take a reassignment of the stock in payment of the note, is alleged. Moreover, the pleadings show that the note was payable in money, and it is clear that all such agreements or understandings, if made, would be void (*Edw. on B.*, 147).

Again, there was no tender or offer to pay the note by a reassignment of the stock or otherwise; on the contrary,

it appears that the defendant refused to pay the same in any manner. The allegations in the answer, on information and belief, "that the plaintiff is not the *bona fide* owner and holder of said note; that he did not receive the same in the usual course of business, nor advance any new or full consideration therefor; that James Plant is the party in interest," &c., are all frivolous. The answer does not deny the facts constituting ownership in the plaintiff. The conclusions only of the defendant are pleaded. This is bad pleading (*Russell v. Clapp*, 4 *How. Pr.*, 347).

The allegation that the plaintiff is not the owner and "holder of the note, and that A. B. is, creates no issue, and amounts to a mere traverse not recognized by our practice" (*Brown v. Ryckman*, 12 *How. Pr.*, 313; *Adams v. Holley*, *Id.*, 326; *Seeley v. Engell*, 17 *Barb.*, 530). And it is not denied in the answer that the plaintiff advanced consideration for the note; therefore these denials or allegation of conclusions are frivolous (*Witherspoon v. Dolan*, 15 *How. Pr.*, 266; *Hollister v. Rice*, *Id.*, 1; *Tompkins v. Acer*, 10 *Id.*, 309).

It seems to me that the denial following such allegations in the answer "of all matters inconsistent with the answer," is merely a reaffirmance, or repetition of the matters previously pleaded.

I hold, therefore, that the matters pleaded are entirely insufficient to constitute a set-off to the note.

There is not a single fact pleaded, showing that James Plant ever became indebted to Stringfield. The mere statement of the conclusion that Plant so became indebted is insufficient (*Van Schaick v. Winne*, 16 *Barb.*, 95; *Myers v. Machado*, 14 *How. Pr.*, 149).

Again, it does not appear that the assignment to Schuyler was made before the note to plaintiff, and therefore it cannot be allowed as a set-off to the note (2 *Rev. Stat.*, 450, 451, 3 ed.).

Judgment must be ordered on the pleadings for the plaintiff.

JOHNSTON *against* LEWIS.*New York Common Pleas ; Special Term, December, 1867.*INTERPLEADER.—COMPETING CLAIMS FOR PRICE OF
GOODS SOLD.

In an action upon a note the defendant showed that the note was given for the price of goods sold to the defendant, and that a third person had sued defendant for the proceeds of the same sale, alleging that he sold the goods to the defendant in his own right, while the plaintiff claimed that such third person, in selling the goods, had acted as plaintiff's agent.—*Held*, that the case was a proper one for an order that, upon defendant's paying the amount of the note and interest into court, such third person should be substituted as defendant, and the present defendant be discharged.

The case of *Trigg v. Hitz* (17 *Abb. Pr.*, 436) approved, but distinguished.

Motion to substitute another defendant.

This action was brought by George Johnston against William R. Lewis, upon a promissory note made and indorsed by defendant. The defendant now moved for an order substituting Daniel Glacken as defendant. In support of this motion he showed by affidavit that Glacken had notified defendant that the moneys due on the note belonged to Glacken, and that he claimed the same ; that Glacken had also commenced a suit against him for the amount ; that the demand of Glacken was made without collusion with the defendant ; and that the defendant did not know to which of the parties he could safely pay the money, but was ready to bring the same into court.

The affidavit of Glacken was also read, in which he stated that the note in question was made for goods sold by him (Glacken) to the defendant, and that he (Glacken) intrusted the note to plaintiff to be discounted, the proceeds to be paid to Glacken.

The affidavit of the plaintiff, read in opposition, alleged that the goods sold to the defendant belonged to the plaintiff, and that Glacken acted only as the agent of plaintiff, in making the sale.

R. L. Scott, for the defendant.

Griswold & Dickinson, for the plaintiff.

Foster & Thomson, for Glacken.

VAN VORST, J.—The application in this case is made by defendant, under section 122 of the code of procedure, to substitute Daniel Glacken as defendant in his place, and to discharge defendant from liability to either party, on his depositing in court the amount of the note. It appears by the papers that Glacken does demand from the defendant the same debt as is sued for in this action, and all collusion between defendant and Glacken is denied.

This being an action founded on contract, the application is proper, and I think should be granted.

I have been referred by the counsel for the plaintiff to the case of *Trigg v. Hitz* (17 *Abb. Pr.*, 436), as an authority which would forbid a substitution in this case. But in that case there was no dispute as to the person from whom the goods were purchased. The vendor in that case, Bernard Rice, although he had fraudulently come in possession of the goods, had a title sufficient to transfer the same to a *bona fide* purchaser, and it was held that the vendees were in such a position that they could not dispute the title of their vendor. That is a well settled principle. But Justice LEONARD, in his well considered opinion in that case, proceeds upon the ground that the goods had been purchased from Rice, to whom the check was given, for a portion of the purchase money.

The case of *Trigg v. Hitz* was correctly decided upon the facts of the case. But in the case now before the court, *two persons* claim to have been the vendor—the plaintiff and Glacken—each claims to have been not only the owner, but the seller of the goods. It is true that the

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defendant may not dispute the title of his vendor—but the question to be determined is, who was the vendor in this instance, and which of the contestants is entitled to the amount of the note in suit.

The sale was ostensibly made by Glacken, claiming to be the owner of the goods. Plaintiff, admitting that Glacken made the sale, insists that he did not sell as owner, but only as the *agent of the plaintiff*, and that he was acting for his principal in relation to the merchandise. The owner of the goods is entitled to the proceeds of the note. The ownership is a disputed point, and both plaintiff and Glacken make claim on defendant for the proceeds.

Defendant should be relieved from embarrassment—he should not be vexed with the claims of two adverse parties, or annoyed by two suits for the same debt, when he is ready to respond to the person having the legal claim to the moneys; and, having expressed his readiness to pay the amount into court, should be allowed to do so, leaving the contestants to settle the controversy between themselves as to which is entitled to the amount.

Motion to substitute Daniel Glacken as defendant, granted, on defendant paying the amount of the note and interest into court.

WOOD *against* THE MAYOR, &c. OF NEW YORK.

Supreme Court, First District; General Term, June, 1864.

APPEAL.—ORDER SETTLING ISSUES.

An order settling issues in a cause of equitable character to be tried by a jury, is not appealable.

The decision at special term in this cause (reported 3 *Ante*, 467),—explained.

Motion to dismiss an appeal.

This cause came before the general term upon an appeal by defendant from an order made at chambers, February, 1868, settling issues for trial by jury. The proceedings upon making that order are reported 3 *Ante*, 467, where the nature of the action, and general facts involved, are stated.

Richard O'Gorman, for the appellants.

George Shea, for the respondent.

CARDOZO, J.—The appeal in this case is founded upon a total misapprehension of the practice in respect to feigned issues. Whether the issues in this action be tried by the court or by a jury, is not, in my judgment, very important; but it is of the highest importance that a rule of equity practice which has prevailed ever since the court of chancery had its existence should not be upturned to gratify a prejudice against an individual. Ever since “feigned issues” were ordered, the question whether they should be allowed or not has been held to be addressed to the discretion of the chancellor; and being a matter of discretion, the granting or withholding of an order for an issue cannot be reviewable (2 *Dan. Ch. Pr.*, 4 ed., 1347).

Indeed, finally, upon the argument the plaintiff's counsel was driven to admit that the granting or refusing the application was not reviewable; but he claimed that when an issue was ordered, if it were not such as the counsel conceded to be right, then there might be an appeal. But the error of this is in supposing that the counsel have anything to do with the question except by way of suggestion, of what the chancellor will try himself, and what he will take the judgment of a jury upon. The whole matter is one for the judge's own “conscience” — the sole object of the jury trial being to inform his “conscience” upon a point as to which he desires information.

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To allow an appeal would be to produce the absurdity of saying that an appellate court shall tell the chancellor that it knows better than he did what the point was upon which he wanted to be assisted by a jury. In an equity case—except a suit for divorce—a jury trial is not a matter of right. The judge may try all the issues, or he may, either upon the application of counsel, or upon his own motion, send any question upon which he prefers the judgment of a jury to that tribunal. If the judge may decline to send any question to the jury, it is absurd to say that an appeal may be taken from his order settling the issue which he wants tried by a jury. If the party upon whom rests the obligation of supporting the issue which the judge frames, chooses to assume it to be immaterial, and not to appear upon the trial of it, then a verdict *pro confesso* upon that point passes against him, and the case returns to the equity side of the court, to be heard upon the pleadings, the verdict, and such evidence as may be taken upon the issues embraced within the pleadings which the judge did not send to the jury. If the issue framed were immaterial, of course the party allowing it to go by default could not be prejudiced, for all the material issues would have to be tried by the judge. The party against whom what appears to be an immaterial issue is ordered, not being bound to try it, is therefore not prejudiced by it, and therefore he cannot appeal from the order on the ground that the judge refused to frame any other issues, because he has not the legal right to have any of the issues tried by a jury. That rests in the discretion of the court—is a mere question of practice—of the form in which the trial shall be conducted—does not affect the merits—and, therefore, is not appealable. The whole purpose of framing an issue and ordering it to be tried by a jury, is, as I have said, to inform the conscience of the court, and the equity judge may regard or disregard the verdict—may order a new trial of that issue, or a trial of some entirely different one, if, and as often as he sees fit; or he may proceed to hear the whole case himself. The whole matter rests exclusively with him.

As the appealability of the order was very pertinaciously argued, I should have felt called upon to cite authorities in support of the views I have expressed, were it not that the question is fully considered and the positions I have taken sustained by the court of appeals in the case of *Clark v. Brooks* (2 *Abb. Pr. N. S.*, 406, 407). Judge HUNT very concisely states the whole law upon this subject. Speaking of the issues framed, he says: "By the established practice those questions might embrace the merits of the case generally, or they might be limited to any portion of it. Such a proceeding is not a trial of the action, but an examination of the particular questions submitted only. At a subsequent time the action itself must be brought on for trial, when these preliminary proceedings are submitted to the court as a part of the proceedings in the case. An award of a feigned issue under the former practice in chancery, or the framing of issues, as now practised, is a proceeding simply to inform the conscience and judgment of the court before which the trial is had. The court to which the result is presented on the trial of the action is authorized to bestow upon it just that degree of attention to which it is entitled. It may rely upon it as satisfactory and conclusive. It may accept it in part, rejecting the other parts. It may discard it entirely (*Lansing v. Russell*, 2 *N. Y.* [2 *Comst.*], 563; *Candee v. Lord*, *Id.*, 269). An award of issues is a matter of practice, and may be granted or refused in the discretion of the court." This exhausts the law upon this subject, and shows that the order below is not reviewable. The learned counsel for the plaintiff failed to cite a single authority in support of the contrary view; and, indeed, the point is so plain that I should not have written so much about it, except in deference to the earnestness which characterized his argument. This disposes of the appeal, but I wish to add a few remarks explanatory of the views which governed me in settling the issues, which I still think are correctly framed. The complaint in this case charges a fraudulent bargain between Mr. Wood on the one side, and "the person then being mayor of the city,

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and divers persons then being members of the common council," on the other. This is plainly what the pleader meant to, and did, charge. I said enough at special term to show the impropriety of sending to a jury a question which involved an inquiry of so indefinite a charge as that the agreement was made with "divers persons being members of the common council." If the plaintiff knows who the divers corrupt members were, he could and should have specified them, or he cannot have an issue framed to send to a jury. But if his allegation be true, that the then mayor, who, with sufficient definiteness, is pointed out by the averments of the complaint, was a party to the alleged corrupt agreement, then the trial of an issue as to whether such corrupt agreement was made between the then mayor and Mr. Wood, would be all sufficient. If that were established, whether there were other parties to it or not would be immaterial. That was a plain, simple issue, not liable, from indefiniteness and generality, to mislead or confuse a jury. That issue was made, and that issue therefore I framed, because, had my "conscience" been satisfied, by the evidence and the verdict of a jury, that it was true, I could have disregarded any other charge of fraud, and on the other hand, if that issue were decided adversely to the city, I thought, and still think, that in view of the general nature of the other allegations, justice demanded that the rest of the case should be tried before a single justice at special term, where, except for some good reason, the law contemplates that equity cases shall be tried. In any view, I think the order below was just, discreet and right, and if it were appealable, should be affirmed; but as it is not reviewable, according to long existing and well settled practice, I am in favor of dismissing the appeal.

BARNARD, P. J., concurred.

SUTHERLAND, J., dissenting.—I agree with nearly all (perhaps I might say all) that Justice CARDOZO has said in his opinion, generally, relating to the appealability of

orders in equity cases, settling and directing the issue or issues of fact to be tried by a jury, and yet I cannot concur in his conclusion, that the order in this case is not appealable. I agree, if the learned justice had denied the plaintiff's motion, and refused to order any issue or issues to be tried by jury, that such determination or action would not have been reviewable. I agree, that in equity cases the court may, in the exercise of its discretion, order, or refuse to order, any, either or all of the issues of fact to be tried by jury, without such discretionary exercise of power, being reviewable by appeal. I agree, if an immaterial or impertinent issue, in or out of the case made by the pleadings in an equity action, is sent for trial by a jury, that the court or judge may, on the final hearing, on the pleadings, proofs and the verdict of the jury on the immaterial and impertinent issues, entirely disregard the verdict.

Yet, I am compelled to dissent from the conclusion, that the order appealed from in this case is not appealable. As I construe the allegation or statement in the complaint, of the alleged corrupt and fraudulent arrangement or agreement, the allegation or statement does not allege a corrupt and fraudulent arrangement or agreement with the then mayor, but does allege a corrupt and fraudulent arrangement and agreement with divers members of the common council, without naming them. The answer contains a general denial of all and every of the allegations of fraud in the complaint. I think the order appealed from, viewed in connection with the reasons given in the opinion for limiting the issue for trial by jury as to fraud in effect, to the inquiry whether there was a fraudulent and corrupt arrangement or agreement with the then mayor, must be regarded as a judicial determination that that issue of fraud was in the case made by the pleadings, and the only triable issue of fraud in the case made by the pleadings, and that the allegation in the complaint as to a corrupt and fraudulent arrangement or agreement with divers members of the common council, without naming them, was too indefinitely stated to be re-

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garded as put in issue by the answer, or as in the case for trial. If this is so, and I am right in my construction of the statement or allegation in the complaint of the alleged corrupt and fraudulent arrangement or agreement, it follows that the order appealed from should be regarded not only as having introduced into the case made by the pleadings an impertinent issue of fact—that is, an issue of fact not made by the pleadings—but also as having judicially ejected from the case made by the pleadings, the principal if not the only issue of fraud and corruption made by the pleadings. If this be so, can it be that the order is not appealable? Can it be that the order does not affect a substantial right,—that it does not materially tend to prejudice the plaintiff? True, on the final hearing or trial of the case, the court may try and determine the real issue or issues of fraud and corruption made by the pleadings, and disregard the verdict on the impertinent or immaterial issue outside of the case. But does it follow, because the court, on the final hearing, has power to do this, that the plaintiff may not be materially prejudiced by the order? I think not. The defendant may move to have impertinent or irrelevant matter stricken from a complaint. If he puts it in issue by his answer, the issue may be disregarded on the trial, but the order striking out or refusing to strike out, is nevertheless appealable. It may be said to be a substantial right of parties to have their cases tried and determined, unembarrassed and unprejudiced by immaterial irrelevant matter or issues, and the regular and convenient administration of justice requires of the courts the enforcement and protection of this right of the parties. If the allegation in the complaint of the alleged fraudulent and corrupt arrangement or agreement should be regarded as an allegation of a fraudulent and corrupt agreement with members of the common council and with the then mayor, I think the order would be appealable, because it limits the issue of fraud or corruption to be tried by jury, to the inquiry whether there was or was not a corrupt or fraudulent agreement with the mayor alone. It is plain to me, if the allegation

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in the complaint was too indefinite or uncertain, in omitting to specify the names of the members of the common council, with whom the alleged corrupt and fraudulent agreement is alleged to have been made, that the defendants' remedy was either a demurrer or a motion to make the allegation more definite and certain—probably the latter.

The considerations above suggested to show that the order is appealable, show also, if the order is appealable, that it should be reversed.

Appeal dismissed, with costs.

GARVEY *against* CAREY.

New York Superior Court ; Special Term, January, 1868.

ACTION ON AWARD.—SUFFICIENCY OF ANSWER.

It is a good defense to an action upon an award of arbitrators, to show that the arbitrators proceeded without notice to the defendant, and that they made the award in suit before the defendant had closed his proofs.

An answer, in an action upon an award of arbitrators, which avers that the arbitrators, in computing the amount to be awarded, made a clerical error in the computation, and that the award was the result of such clerical error, is sufficient upon demurrer, although it does not show what the nature of the mistake was.

Demurrer to an answer.

This action was brought to recover upon an award of arbitrators.

The submission was, "to settle all accounts and differences between said Carey and Garvey growing out of and relating to five certain buildings erected on the southwest corner of Fiftieth-street and Sixth-avenue, in the city of

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New York; said settlement to be governed and founded on a certain agreement made and entered into by and between said Carey and Garvey, bearing date January 23, 1867." Upon this submission, the arbitrators made an award, "that John Garvey is entitled to receive from John G. Carey the sum of five thousand one hundred and twenty-five dollars and sixty cents, as his share of the profits derived from said buildings, cash advanced by Carey to Garvey to be refunded by said Garvey.

To the complaint the defendant answered :

1. That the arbitrators, after first notifying the parties to appear before them, and after having partly heard the allegations of the defendant, proceeded irregularly and illegally, without notice to the defendant, and without fixing any day for the hearing of the matters submitted; and made their award before the case was finally submitted to them, and before the defendant had concluded his proofs and allegations before them.

2. That the arbitrators, in computing the amount of profits to which each party would be entitled under the agreement, made a mistake in such computation—which mistake was a clerical error—and that the award was the result of such clerical error.

The plaintiff now demurred to the answer for insufficiency.

George C. Genet, for the plaintiff.

Nelson Smith, for the defendant.

MONELL, J.—The answer in this case is, I think, sufficient both in substance and in form. The defendant seeks to avoid the award on two grounds—namely, misconduct on the part of the arbitrators, and mistake in ascertaining the amount due from the defendant to plaintiff. Such grounds were always sufficient, in equity, to vacate and annul an award (*Herrick v. Blair*, 1 *Johns. Ch.*, 101; *Van Cortlandt v. Underhill*, 1 *Johns.*, 405; *Bouck v. Wilber*, 4 *Johns. Ch.*, 405; *Knox v. Symmonds*, 1 *Ves.*, 369; *Corneforth v. Geer*, 2 *Vern.*, 705), and may now be set

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up as a defense to an action upon the award (*Dobson v. Pearce*, 12 *N. Y.* [2 *Kern.*], 156; *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y.* [4 *Kern.*], 85).

The misconduct complained of, was in proceeding without notice to the defendant, and without fixing any day for the hearing of the matters submitted, and in making the award before the case was finally submitted to the arbitrators, and before the defendant had concluded his proofs. If the defendant shall be able to sustain these charges of misconduct, by proof, I think he will make out a strong case against the validity of the award, and be entitled to have it set aside. The charges of misbehavior are stronger than in any of the cases to which I have referred.

The second defense demurred to—of mistake in the computation made by the arbitrators—is a little indefinitely stated. It does not appear what the nature of the mistake was, except that it is alleged that it was a clerical error. I think, however; it was sufficient in form, and proof may be given under it of such a mistake as the court will recognize as sufficient to vacate the award.

The disposition I have made of the demurrer renders it unnecessary for me to decide whether the complaint states a cause of action.

The defendant must have judgment on the demurrer, with costs.

Judgment accordingly.

WHITE *against* BROWNELL.*New York Common Pleas ; General Term, June, 1868.*

THE NEW YORK "OPEN BOARD OF BROKERS."—RIGHTS OF MEMBERS.

The Open Board of Brokers in the city of New York is not a copartnership, within the operation of the equitable remedies afforded by the courts for the protection of the rights of partners as between themselves.

Nor is that board a corporation, in such sense as to render it subject to the rules by which courts of equity interfere to restore a corporator who has been unlawfully expelled or disfranchised, to his privileges of membership.

As the privileges of membership in a voluntary unincorporated association are not conferred by the sovereign power, but are merely created by the organization itself, courts of law cannot compel the admission of an applicant for membership, nor interfere to restore a member who has been deprived for non-compliance with the conditions on which membership is made to depend.

In a suit for an injunction to restrain the officers of a voluntary incorporated association from carrying into effect a resolution or vote suspending the plaintiff from membership, the only question which can arise is, whether the plaintiff was suspended in accordance with the constitution and by-laws of the association. Unless they were violated by the proceedings against him, he has no ground of complaint. Those who become members of such associations are bound by their rules, not being in conflict with the law of the land; and the courts can interfere no further than to hold the association to a fair and honest administration of those rules.

The decision at special term in the case of *White v. Brownell*, 3 *Ante*, 318, —affirmed.

Appeal from an order at special term, granting a motion to dissolve an injunction.

The general facts out of which the controversy in this action arose, are fully stated in the report of the decision appealed from (3 *Ante*, 318). The case now came before

the general term on an appeal by the plaintiff from the order dissolving his temporary injunction.

William C. Barrett, for the appellant.—*First.* The plaintiff is a member of the Open Board of Stockbrokers in the city of New York. This board is a voluntary association of individuals, organized under no statute, nor other special enactment, its object being to afford the members the conveniences of a public mart or stock exchange. The plaintiff was lately suspended by the defendant Brownell (as president of the board) from membership. Deeming such action to be void, he commenced this suit, for the purpose of testing that question, and obtained a temporary injunction restraining the board from further interference with his rights, privileges and franchises as a member of the association.

The facts which led to his suspension were these: on the 18th of February, 1867, Mr. White made a contract with the firm of Curry, Martin & Co., who are also members of the board, whereby he agreed to sell to them, and they agreed to purchase from him, one thousand shares of the capital stock of the Hudson River Railroad Company at the price of \$128 per share. By the terms of this contract, the stock was to be delivered, and the contract price paid at any time which might suit Mr. White's pleasure during the year of 1867. Afterwards, and on the 18th day of April, 1867, the Hudson River Railroad Company adopted certain resolutions for the increase of the capital stock of the company. The effect of these resolutions was to permit any person who appeared to be a stockholder upon the books of the company, on April 10, 1867 (when the books were closed), to subscribe for as many shares of the increased stock as he held of the old, by paying either the sum of \$50 per share in cash, and thereupon at once receiving the new shares; or by paying the sum of \$54 per share in installments; and thereupon receiving the new shares on October 15, 1867. On April 10, 1867, but *after the transfer books of the Company had been closed*, and when it was too late for a person not then

a stockholder to subscribe for the new stock, Currie, Martin & Co. notified Mr. White that they elected to subscribe for the additional stock. This was the only notice which Mr. White ever received from them. They never told him whether they desired cash stock at \$50 per share, or time stock at \$54 per share; nor did they ever tender him any money to enable him to effect such subscription. Mr. White, in fact, was not then a stockholder, and had no intention of becoming one until such time as in the exercise of the option conferred upon him by the contract, he made the necessary purchase wherewith to fulfil said contract. Each of the parties from time to time deposited in the United States Trust Co., as security for the faithful performance of the contract, various sums of money, amounting in the aggregate to \$55,000 each.

On September 5, 1867, Currie, Martin & Co. called upon the plaintiff to put up \$10,000 margin beyond the \$55,000 already on deposit. At this point the dispute arose. C., M. & Co. claimed that the plaintiff was bound to deliver them 2,000 shares of stock upon this contract calling for but 1,000. If they were right in that demand, then the plaintiff was deficient in margin. If they were wrong, then the plaintiff had an abundance of margin. C., M. & Co. claimed that, according to some Wall-street usage, where a party makes a contract for the delivery of stock at a future day, all dividends declared by the company between the date of the contract and that of the delivery, enured to the benefit of the purchaser; and they insisted that this increase of the capital stock was in the nature of a dividend, and that they thus became entitled to the additional 1,000 shares, which it was the option of the stockholders to subscribe for or not, at their pleasure. Mr. White declined to acknowledge the correctness of this position, and refused to deposit additional margin, asserting, as was the fact, that his margin was ample as security for the delivery of 1,000 shares of the stock. C., M. & Co. then took measures to close the transaction, in their way, and according to their ideas of legality and fitness, by purchasing 2,000 shares of the stock at the board. This

was done against the solemn protest of the plaintiff, and thereupon they rendered him an account, claiming a deficiency of \$69,633.34, which they insisted was due to them upon the basis of the claim above referred to. They then cited Mr. White to appear before the arbitration committee of the board, to have the matter in dispute adjudicated by the so-called tribunal. This Mr. White declined to do; and he protested against the jurisdiction of the arbitration committee. Notwithstanding Mr. White's protest, this extraordinary tribunal sat *ex-parte*, and heard C., M. & Co.'s case, and, so to speak, granted a judgment by default against Mr. White; finding that he was bound to deliver 2,000 shares, instead of the 1,000 contracted for, and that he must pay the amount of the difference between the contract price and the market value of the 2,000 shares (\$69,633.34). Upon this misnamed "adjudication," and upon this alone, Mr. White was suspended from his membership, under a provision in the constitution and by-laws, which declared that whenever a member is *in default* in any contract, the president of the board shall at once declare the member so reported suspended from all the privileges and immunities of the organization. The only evidence which the board had that Mr. White was in default, was the "adjudication" of this arbitration committee, who had heard and decided the case upon the assumption that they possessed the same power as this court in granting an inquest upon the call of the calendar at trial term.

Second. The following points are made:—

I. That the Open Board of Brokers is a voluntary association subject to equitable jurisdiction, and to be treated in a court of equity by those rules which govern in the cases of the partnerships.

II. That even if it be treated strictly as a voluntary association and not in any respect a partnership, the plaintiff is still entitled to the redress which he seeks.

III. That the suspension of the plaintiff was wholly illegal, and was not even regular under the constitution and by-laws of the board itself.

IV. That the entire equity of the bill is admitted, and that the case stands as upon the final hearing, and that in every conceivable aspect of the case, the plaintiff was entitled to the injunction.

The defendant's argument admitted that it would be perfectly monstrous that bodies of men formed into voluntary associations for private purposes under private contracts, should create tribunals with the power of adjudicating upon, and working forfeitures of private property, yet he claimed that they might make such provisions as they pleased—by contract between the members—for the adjudication of their disputes and differences; and that they might execute the decrees resulting from such adjudications so far only as to deprive a member *of his membership*:—in other words, that the question of membership was one which belonged solely to the association, and that the courts could not entertain any suit whereby a re-examination or review of the matters so passed upon was sought. I submit that this doctrine is wholly untenable.

In the first place, I claim that the right of membership is, if possible, a higher and greater right than the right of property itself. For what is membership? It is the right of the individual to have free access to that board, exchange, mart, or bourse, and there, day by day, to attend to his business, execute his orders, and earn *the very property* which it is conceded that the law will protect, notwithstanding the decree of any tribunal so formed but acting without a special submission. Now, here, this right of membership, a right which is seemingly intangible, the value of which cannot be defined, is just as exalted a right to the broker as the education or clientage of a lawyer, or as his office location. The *lesser* right, in property, springs from the full and free enjoyment of this greater right. Take away the latter and you take away forever the power of acquiring the former. Yet it is so seriously claimed that while the courts have the power to protect the lesser right, notwithstanding the contract, they have not the power to protect the higher. It is claimed,

too, that whether C., M. & Co. were right or wrong in their demands is not of the slightest consequence ; that it is sufficient and conclusive that the board had arbitrarily decided that they were right ; and that so far as the plaintiff's suspension, uncoupled with any forfeiture of material property, is the sole deduction of the board from that finding, no court in the land can look into it to ascertain whether the decision was or was not without foundation ; whether justice or gross injustice had been done ; and that, so far as the question of membership is concerned, the plaintiff is wholly remediless.

This association was claimed to be of such a peculiar nature that it was essential that there should be harmony between its members, and a strict compliance with the rules. Granted. Now there is another species of society, where all this is of still greater importance. Take the case of an ordinary unincorporated club-house. Suppose that such an institution—and in illustrating from that extreme point of view, I am going much further than is required by my present purpose—has a regulation to the effect that any member, complaining that another member has been guilty of ungentlemanly conduct, shall have the right to cite the alleged offender before an arbitration committee of the society, and if the charges be found to be true, the offending member shall be suspended. Suppose that Mr. White, being one of the members, has the peculiar notion that sitting in the drawing-room with his hat off, is gentlemanly conduct. Conceive that Mr. C., another member, is of the clear opinion that that constitutes ungentlemanly conduct, and that he cites Mr. White before the arbitration committee. Mr. White declines the proffered arbitration. He is, nevertheless, found guilty and suspended. The day before this took place, he for the first time became a member : perhaps he paid \$1,000 initiation fee, and, in addition, his yearly dues, upon the agreement that he should enjoy the restaurant, the billiard-table, the newspapers and books, the rooms, the lounges, and all the other comforts of the place, in common with his fellow members. All these rights are

torn, and his money filched from him, within twenty-four hours, by his brother members, and when he comes into a court of equity asking that their hands be stayed, that this shameless injustice be stopped by the high process of injunction, he is met by the response, "Why, you contracted for this very state of things when you signed the constitution and by-laws!" This is what the doctrine (that it is of no consequence whether C., M. & Co. were right or wrong) must logically bring us to. I shall show hereafter that from an analogy of the rules laid down in respect to the disfranchisement of members even of corporations acting under the authority of special laws, as well as in the cases of voluntary associations, and of clubs, the authorities, as well as the principle, are all the other way. For the present, let me show that the suspension was contrary to the plain language of their own constitution and by-laws. A member can only be suspended according to the terms of this constitution and these by-laws for being in *default*. He cannot be suspended for a *refusal to arbitrate*. There is no provision anywhere for the expulsion or suspension of a member for a refusal to arbitrate—only for being in default. Now the first thing to be considered is, whether he was in default or not. If he was not in default in fact, then the society, according to its own constitution and by-laws, had no right to suspend him or expel him; and there is no provision in the constitution or by-laws for ascertaining in the body itself, or otherwise than by the laws of the land, whether a member be in default or not, unless that member *voluntarily submits* to the jurisdiction of the arbitration committee. There is nothing strained or unreasonable in this construction of the constitution; for it is plain that the provision for the suspension of a member "*in default*" was intended for the case of an actual defaulter, for a man who had failed, in the ordinary understanding and acceptance of the term, or one about whose "failure" there could be no question. Surely, it could never have been intended for a case where, to say the least, there was a grave question of law arising upon the construction

of the contract, and the rights and obligations of the parties thereunder—never intended to operate against a man who, like Mr. White, is perfectly solvent, and going on regularly with his business, who is able to deposit \$55,000 to secure his contract, and who is perfectly able and willing to deposit \$55,000 more, to secure any judgment which C., M. & Co. may ever recover against him. It was intended for well known and clearly defined failures.

Now, I submit that not only was Mr. White not in default under his contract, but that the claim of his being in default is preposterous. And if he is not *in default*, then he is still a member, and the suspension, being solely for the reason that he was in default, is null and void. The board says, however, that he is in default, because the arbitration committee have so found. To this I answer: 1. That the finding of the arbitration committee, without a voluntary submission to their jurisdiction, no more establishes the fact of a default, *for any purpose whatever*, than the finding of any stranger in the street. 2. That there is no provision in the constitution or by-laws that the question whether a member is in default for the purpose of predicated thereon a suspension shall be ascertained in any particular manner. I need cite no authority in support of the proposition that there can be no valid award without submission to arbitration; and when the constitution provides that the arbitration committee shall have jurisdiction over all matters of difference between the members, such provision must be deemed to have been inserted with reference to the law of the land, and not in derogation of the law. It was, therefore, simply a provision which prescribed a tribunal for members who should be willing and desirous of submitting disputed questions. It furnished all the machinery of the judicatory, so that when the members resolved to submit a question they should find a regularly-organized body prepared for them. It was never intended that, where a member desired to have his dispute properly and legally adjudicated, that desire should cost him his dearest rights, and should work a forfeiture of the very franchises whereby

his living was earned. Had it been intended to make such a monstrous provision, is it not plain that it would have been direct and specific, and that the constitution would have gone further, and provided for a suspension because of a *refusal to arbitrate*? But here is the difficulty in the defendants' position. Even upon their own constitution and by-laws, I repeat, there is no provision whereby any member can be suspended for a *refusal to arbitrate*. Now, if a member cannot be suspended for a refusal to arbitrate, he cannot be suspended by reason of an *ex-parte* award made without a submission; and the defendants must come to the point that an *ex-parte* award without a submission is no evidence of a default, either for the board or for this court, for the purpose of working a suspension of the enjoyment of property or of membership, or for any purpose whatever, the member not having *expressly* contracted that the fact of a default shall be predicated thereon, and it being monstrous to claim that he has done so *by implication*.

Third. Now, let us look at the authorities.—I. The case of *Austin v. Searing* (16 N. Y., 112) is only distinguishable from the present in that the question was one there of the forfeiture, not of membership, but of property, in a voluntary association. The court says, —speaking of such voluntary associations,—that “to create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunals for themselves in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. *A contract that the parties will submit confers no power upon the arbitrator*; and even when there is an actual submission, it may be revoked at any time.” And again, that “by-laws and regulations of these voluntary associations may be all very well in their place and sphere. . . . They cannot, however, have the force of law, nor impair nor affect the rights of property against the will of the real owners.” The case of *Lloyd v. Loring* (6 Ves., 733) is to the same effect. See, also, upon the question of submission to arbitration: *Haggart*

v. Morgan (5 *N. Y.* [1 *Seld.*], 422), *Mitchell v. Harris* (2 *Ves. Jr.*, 129 & n., Sumner's ed. ; 8 *Durnf. & E.*, 139 ; 2 *Story Eq. Jur.*, §§ 1457, 1458), *Simons v. Monier* (29 *Barb.*, 419), *Smith v. Compton* (20 *Id.*, 262).

II. It is not important, for the purposes of this investigation, what particular definition the court may give of this association. It was claimed below that it was not a partnership, nor yet a joint-stock association, nor a corporation ; but that it was a species of hybrid affair which did not come under any of the usual heads upon which equitable relief is administered. I apprehend that the plaintiff is entitled to the relief sought, no matter what this court may conclude the association to be. It may be well, however, to consider for a moment what the legal *status* of this association is. I do not claim that it is strictly a partnership, yet I do claim and insist that *in equity* it is governed by the same rules ; and that the rights of the members are the subject of the same general equitable jurisdiction as in the case of partnerships. I claim less, however, than the adjudged cases warrant (*Wells v. Gates*, 18 *Barb.*, 554 ; *Dennis v. Kennedy*, 19 *Id.*, 517). And a similar rule has been laid down, even in the case of joint-stock associations (*Allen v. Sewall*, 2 *Wend.*, 327 ; *Moss v. Oakley*, 2 *Hill*, 265 ; *Bailey v. Bancker*, 3 *Id.*, 188 ; *Harger v. McCollough*, 2 *Den.*, 119 ; *Corning v. McCollough*, 1 *N. Y.* [1 *Comst.*], 47).

III. In the case of the St. James' Club (13 *Eng. L. & Eq.*, 592), a question arose before the lord-chancellor, Lord ST. LEONARDS, in respect to the rights of members in an ordinary club. Lord ST. LEONARDS said that if the club was dissolved, each member would have a right to a share of the assets. He would lose the convenience of the club, but he would get a share of the assets ; otherwise, he would only have a right of admission to the enjoyment of the club. In the case at bar the objects of the association are not pleasure or convenience, and there is therefore a still stronger reason for the claim that the member is a joint tenant in and vested in common with the other members with all the assets, franchises and privileges of the

association. That he is clearly liable for the debts will scarcely be disputed. Mr. White, for instance, while to-day prevented by his fellow-members from enjoying his rights as a member, is clearly liable to an action by the creditors of the association; and is it not perfectly clear that if in any such action he should plead his suspension by the act of his associates as a defense, it would be stricken out as frivolous? So here then is presented the singular spectacle of a man fully vested, in common with all the other members, with all the assets of the association, and liable for its debts, yet denied access to its apartments and prevented from enjoying any of the privileges for which he has assumed these liabilities, for which he has paid his money; and which are the concomitants of his vested interest in the assets.

IV. A distinction was made in England, in the case of ordinary clubs conducted upon ready money principles, to the effect that a tradesman supplying goods to such a club, does so upon the credit of the funds, and that, *at law*, the members of such a club are not individually liable for debts incurred by its committee (*Caldicott v. Griffiths*, 22 *Eng. L. & Eq.*, 527; and cases there cited in the briefs of counsel). This distinction, however, is only applicable to proceedings at law as between the creditors of the association and the members. They have, however, invariably been treated and dealt with in the courts of equity as partnerships (*Colly. Partn.*, § 53; *Beaumont v. Meredith*, 3 *Ves. & B.*, 180; *Greenwood's Case*, 23 *Eng. L. & Eq.*, 422; *Richardson v. Hastings*, 29 *Eng. Ch.*, 323). And the courts of equity have invariably examined and considered the reasons for the expulsion of members, and if injustice has been done, they have been prompt in correcting abuses and affording adequate redress; and that too in cases where the equities were infinitesimal, compared with the present (*Innes v. Wylee*, 1 *Carr & K.*, 257; *Exp. Wooldridge*, 1 *Ell., B. & S.*, 844; *Bluset v. Daniel*, 23 *Eng. L. & Eq.*, 105; *Regina v. Mallison*, 1 *Id.*, 289; *Bury v. Cross*, 3 *Sandf. Ch.*, 1; *Commonwealth v.*

Pike Benefit Society, 8 *Watts & S.*, 247; *Gormon v. Russell*, 14 *Cal.*, 531, and cases there cited).

V. Even in the case of corporations where special statutes have given the body power to expel or suspend its members, the courts have never refrained from investigating the justice and correctness of the procedure. The suggestion so boldly enunciated here will nowhere be found in any of the cases, that it is of no consequence whether the society or corporation be right or wrong, regular or irregular; whether there were cause for suspension or not; whether the member were in default or not; and that the courts of justice cannot inquire into the matter; but must deem the action of the society to be final and conclusive. On the contrary, even in the cases where such express power is conferred *by statute*, the justice, the legality, and even the regularity of its action therein have always been the questions debated before the courts, and upon which the decision in respect to the restoration to membership has invariably hinged. The general rule is, that corporations can exercise this jurisdiction only in case of offenses recognized by the common law as cause for expulsion. Of these there are but three: 1. Violation of duty to the society, as a member of the corporation. 2. Offenses as a citizen against the laws of the country. 3. Breach of duty in respect alike to the corporation and the laws (2 *Burr.*, 732). See, also, *People v. Medical Society of Erie* (24 *Barb.*, 570, affirmed in the court of appeals, in 32 *N. Y.*, 18), *Commonwealth v. St. Patrick Benefit Society* (2 *Binn.*, 511), *Green v. African Methodist Episcopal Society* (1 *Serg. & R.*, 254), *Commonwealth v. German* (15 *Pa. St.*, 251), *Fuller v. Trustees of Academy School in Plainfield* (6 *Conn.*, 533),—all of which go to show that no matter how the association may be viewed, whether as a corporation, joint-stock association, partnership, joint adventure, joint tenancy, or as an undefinable voluntary association, of a special and peculiar character,—still there can be no given case where a person has been expelled or suspended, or deprived of any of his legal or equitable rights, without the courts' sifting the matter to

the bottom ; and if such person has been illegally, wrongfully, or even irregularly deprived of his rights, he will be restored to their full possession and enjoyment. None of these cases possess the grave considerations suggested by the case at bar ; in none of them was a man removed for a default which did not exist in fact, and which never had been legally, equitably, or morally found to exist. In none of them was a man disfranchised for refusing to submit a question, involving over \$69,000, to a tribunal for a refusal to submit to whose jurisdiction, there was no provision in the constitution or by-laws authorizing a suspension. In no case was the *ex-parte*, partial, and prejudiced award of a committee, to whom nothing had been submitted, taken as the conclusive evidence of the existence of the fact upon which the suspension was or could be based.

VI. Some objection was taken upon the argument to the form of the relief sought, but it is submitted that the plaintiff was clearly entitled to it upon several grounds : 1. He is entitled to it upon the ground that his copartners, or co-tenants, seek to exclude him from taking that part in the concern which he is entitled to take (*Story Partn.*, 3 ed., 356 n. ; *Wilson v. Greenwood*, 1 *Swanst.*, 481 ; *Colly. Partn.*, 2 ed., book 2, ch. 3, § 6, pp. 240, 241). 2. He is also entitled to it upon the ground that one partner may apply to a court of equity to restrain the oppression and overbearing of another partner (*Charlton v. Poulter*, 1 *Ves.*, 429, and 19 *Id.*, 148 ; *Story Partn.*, 227 ; *Colly. Partn.*, book 2, ch. 3, § 5, p. 313). 3. And the plaintiff is entitled to the relief sought, although he does not ask a dissolution of the association. In fact, he is not entitled to a dissolution, unless the court sees that redress cannot be afforded without a winding-up (*Gow Partn.*, 3 ed., ch. 2, § 4, pp. 111, 112). 4. The opinion that a partner's misconduct may be restrained by injunction, without the necessity of a dissolution, is sanctioned by Lord ELDON (*Goodman v. Whitcomb*, 1 *Jac. & W.*, 572). 5. And if not a partner, the plaintiff

would still be entitled to an injunction on the well-known ground of irreparable injury and the total destruction of business (*Carpenter v. Gwynn*, 35 *Barb.*, 395 ; *Livingston v. Livingston*, 6 *Johns. Ch.*, 497 ; *Holdane v. Trustees, &c.*, 21 *N. Y.*, 474, and 23 *Barb.*, 103).

VII. It was also claimed that the plaintiff was not entitled to an injunction until the final hearing ; but, 1. It is plain that there has not been an attempt to deny a single prominent fact upon which the equities rest. The case, therefore, is to be treated as upon the hearing (*Grimstone v. Carter*, 3 *Paige*, 421). 2. But had the equities been denied, it is a clear case of irreparable injury ; nay more, of ruin and destruction to a man's business ; a case without remedy of any kind at law—no pretense that a *mandamus*, *quo warranto*, or even the useless action for damages would lie ; in fact a case of absolute and entire ruin, and that ruin between now and the hearing. An injunction was never refused under such circumstances. It has been granted with far less equity (*Livingston v. Livingston*, 6 *Johns. Ch.*, 497 ; *Spear v. Cutler*, 2 *Code R.*, 100 ; *Dubois v. Budlong*, 15 *Abb. Pr.*, 445 ; *Ryckman v. Coleman*, 21 *How. Pr.*, 404). 3. And it is by no means of course to dissolve an injunction upon a full denial of the equity of the bill, if the court, in the exercise of a sound discretion, can see a good ground for retaining it,—and it ever, in such cases, rests in the sound discretion of the court (*Bank Monroe v. Schermerhorn*, *Clarke*, 303 ; *Benson v. The Mayor, &c.*, 10 *Barb.*, 223 ; *Vermilye v. Vermilye*, 14 *How. Pr.*, 470). 4. The rule, even in an ordinary case, without any of the extraordinary equities of this, is to continue the injunction, if upon the papers there is probable cause for the belief that the plaintiff will be ultimately decreed the relief asked, or if the rights sought to be protected are free from reasonable doubt (*Snowden v. Noah*, *Hopk.*, 347 ; *Bruce v. Delaware & Hudson Canal Co.*, 19 *Barb.*, 371). 5. The preliminary injunction cannot possibly prejudice the defendant ; while without it, the plaintiff is a ruined man. This is a well settled ground for retaining a preliminary injunction, even when all the

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equities are denied (*Carpenter v. Danforth*, 19 *Abb. Pr.*, 225 ; *Church Holy Innocents v. Keech*, 5 *Bosw.*, 691).

VIII. Another point was made below, based upon the undoubted rule that a court of equity will not aid a party in specifically enforcing a contract which he has himself violated. 1. White did not violate the contract. Every agreement must have a fair and reasonable construction. Mr. White has violated no provision that the court will say he should have conformed to. Suppose he had, would that really have affected the present right, the enforcement of which is evoked. No ! for he does not ask a specific enforcement of the contract, or any provision thereof. He simply asks, *not* a scrupulous fulfillment of the constitution and by-laws, or any one of them, but that he may not be treated as an outcast, that he may not be deprived of all the rights of an associate in an association, avowedly continuing, and of which he is in law and equity a member, and liable for its debts. He is not asking that his partners or associates do any affirmative act which they have contracted to do, but simply to refrain from refusing to let him into the apartments of the association ; from refusing to let him look at the partnership books ; in fact to refrain from absolute ouster and disfranchisement.

William R. Martin, for the respondents. — I. The constitution and by-laws of the Open Board are a contract between its members. They provide for the suspension of a member, and the plaintiff was suspended in precise conformity therewith, and was rightly suspended. 1. He had signed its constitution and pledged himself to abide by the same, and also by its by-laws, resolutions and rules. These instruments, therefore, become his contract with his fellow members, and the case before the court is primarily one of the construction of contract (*Austin v. Searing*, 16 *N. Y.*, 121). The duty of the president to suspend him is made, by the by-laws, imperative, upon the report of the committee on membership. Their duty to make this report is imperative, after due investigation, when the fact that a member is in default becomes

by any means known to them. 2. That brings us to this question : Was it a fact that he was in default ? The constitution and by-laws afford a precise means of ascertaining this fact. The last clause of the contract between plaintiff and Currie, Martin & Co., reads thus : " Either party having the right to call, from time to time, for deposits to meet the fluctuations of the market." And it was upon a call for a deposit of this sort that proceedings were had under the by-laws, which resulted in a charge by Currie, Martin & Co. against Mr. White for a deficiency, and which made the case which they brought to the cognizance of the arbitration committee, under the provisions of the constitution. By these provisions it was made the duty of the arbitration committee to take cognizance of, and exercise jurisdiction over, all claims and all matters of difference between members of the board. They exercised their jurisdiction ; gave him notice of the hearing ; he absented himself ; they heard the merits "*ex-parte*," and decided against him. This fact coming, in due course and by whatever means, to the knowledge of the committee on membership, required of them an investigation, but not a hearing of the parties on the merits. The form in which this came was a sufficient warrant for their report. These proceedings, being entirely free from fraud or irregularity of any kind, made the default an ascertained and conclusive case upon the members of the board. The defendant neglected to take, and thereby waived, his appeal. This made it a final determination. The arbitration committee had determined that they had jurisdiction. Their judgment could not be attacked collaterally in any co-ordinate administrative branch of the association, and as to all these committees was conclusive as to the fact of default. So far as the plaintiff's contract is concerned, he was regularly suspended in conformity to its terms ; and if these proceedings are not subject to any legal objection—a point which will presently be examined—he was rightfully suspended. 3. These objections may be—that the arbitration committee had no jurisdiction of the person or of the subject-matter ; and, that the decision of

the arbitration committee was not conclusive as to the fact of the default, in face of his action before the committee.

II. In order to import into this case an equitable ground for the injunction, it is asserted that this association is a partnership; and upon that, that the general principles of partnership warrant the injunction, *i. e.*, whatever a partner may do, this plaintiff may do; or, to put it logically, this plaintiff says: If this were a partnership, on the facts of this case, a special injunction would lie against the defendants. This is a partnership; therefore the injunction is to be sustained. We controvert both the premises. 1. This association is not a partnership. It wholly lacks the characteristics of a partnership. The members do not share profit and loss. They do not hold themselves out as partners. Their constitution does not declare them partners. They are not a society having gain for their object. They have no partnership property, used in any business or as a source of profit, in the sense that a mercantile partnership has. At the common law they are not jointly liable as partners. They do not make money for their common benefit, nor divide their gains; but the reverse. They are not partners between themselves, nor as to third persons. No consequence happens to the others if one of them dies. Their property is only the accumulation of dues and entrance fees. This does not consist of shares, is not transferable, and is not separable from the personal right of membership. They are like a partnership in nothing else than that they are not a single individual. They are in fact a club—neither more or less than a club. These institutions are known to the courts, and their rights and status have been adjudicated upon in the English courts for a century. A club is a society which gives to its members social and personal rights and privileges, in such direction as they determine, within the whole range of social, artistic, literary, political, or business objects, &c., &c. Their main point is the strict qualifications for membership and the conditions of its tenure. Their rights of property are the same as the rights of property in this association. The only point distin-

guishing this association from a club is the very point in which all clubs differ—their object. If this association should change its objects for the political objects of the Manhattan Club, and the Manhattan take on the business objects of this association, the other essential characteristics of each might remain unchanged. And there is nothing in the special object of this association which distinguishes it from a club, as such institutions are generally understood, and makes it take on any of the characteristics of a partnership. This attempt at definition or classification has this bearing on the argument, that, in any aspect, this association is not a partnership (*Lindl. Partn.*, 62; *Cox v. Hickman*, 8 *Ho. of L. Cas.*, 268; *Caldicott v. Griffiths*, 8 *Exch.*, 898). 2. Nor, in the second place, if this association were a partnership, would the special facts of this case warrant an injunction. Here a fact must be kept in view, because it is the ground of a distinction, fatal at all its steps to the plaintiff's argument. The plaintiff has, in this association, a personal or social right of attendance and of doing his business there, in conformity with their rules and regulations, that is, in conformity with the provisions of his contract. He has also his share in the accumulated fund. He is suspended, not expelled from membership. His personal right of attendance is gone, but his property is not forfeited or affected. This distinction, therefore, is applicable to this case: that the rules of law which protect rights of property, do not in like manner apply where simply personal or social rights, as here, are in question. Again, the cases in which injunctions have issued in actions between partners, show that they issue against partners only where they have been guilty of a breach of the contract, or of misconduct in a point not covered by the contract (*Eden Inj.*, 220; 2 *Lindl. Partn.*, 1002, 1009; where are collected all the cases in which injunctions against partners have been issued). Here no breach of the contract by the defendant is alleged. 3. As against partners who are guilty of misconduct that does not involve a breach of the contract, it seems to be settled that an injunction will not issue to sus-

tain a partner in the simple exercise of a personal right, or a right of personal attendance, *except his right of property* is also in question. It is difficult to imagine the case where a *partner* might seek to maintain a purely personal right separate from any right of property, and this difficulty shows that no analogy can be traced between this association and a partnership beneficial to the plaintiff (*Hall v. Hall*, 12 *Beav.*, 414). 4. The doctrine of Lord ELDON, that the courts would not grant an injunction against partners, unless there were grounds for a dissolution (*Marshall v. Coleman*, 2 *Jac. & W.*, 266; *Colly. Partn.*, § 346), has been modified by granting injunctions where dissolution of the partnership was not decreed—in exceptional and extraordinary cases. But there appears to be no case where it was done merely to sustain a personal right and continue the partnership. On the contrary, there are cases where personal questions and controversies arose, and the courts have held it to be ground for dissolving the partnership. As against partners guilty of misconduct, but not of a breach of the contract, an injunction will not be issued to sustain a partner in his purely personal rights, where no rights of property are involved, and, further, where the continuance of the partnership was sought, the court would not fail to consider whether the injunction would not be to the mutual injury of the partners, in which case the partnership would be dissolved (*Watney v. Wells*, 30 *Beav.*, 56; *Harrison v. Tennant*, 21 *Id.*, 482).

III. The provision for arbitration in the constitution was the subject of much criticism. It was argued: That the plaintiff was not bound by the arbitration clause. That he might refuse to arbitrate, and that no consequence attached to the refusal. That a suspension must be preceded by a default. That he revoked the agreement to arbitrate, and the law favors such revocations. That he did not agree to submit, but, only, that in case he did submit, the arbitration committee was to be the tribunal. That the arbitration committee had no power to determine the fact of default. That this court must pass upon it as a ques-

tion of fact and of law upon all the special facts of the contract, whether the plaintiff was in default within the by-laws. I propose, therefore, to examine the doctrine of arbitration, and the proceedings of this arbitration, to an extent sufficient to establish these points. 1. That the plaintiff was bound by the arbitration clause. 2. That the decision of the arbitration committee is conclusive here as to the fact of a default within the by-laws. 3. That no question arises here concerning the correctness of the decision against the plaintiff in point of law or in matter of fact.

IV. There is no rule or principle of law denying to a man the natural liberty of waiving a remedy before the tribunals of justice, and accepting as final, in respect to his rights, the act or arbitrament of some private person. He may make such act or arbitrament the condition precedent of any other right, as a right of action, or retention of membership (*Scott v. Avery*, 5 *Ho. Lo. Ca.*, 811; *Horton v. Sayer*, 5 *Jur. N. S.*, 989; *Lee v. Page*, 7 *Id.*, 768; *Scott v. Liverpool*, 27 *Law J. Chy.*, 641; *Tredwin v. Holman*, 8 *Jur. N. S.*, 1080; *Westwood v. Secretary of State for India*, 7 *Law T. N. S. Q. B.*, 736; *Braunstein v. Accidental Insurance Co.*, 31 *Law J. Q. B.*, 17; *Elliott v. Royal Exchange Assurance Co.*, 2 *Law Rep. Exch.*, 237; *Inman v. Western Fire Insurance Co.*, 12 *Wend.*, 459-60; *Wood v. Worsley*, 6 *Durnf. & E.*, 710; *Ranger v. Great Western R. Co.*, 27 *Eng. L. & Eq.*, 35; *Avery v. Scott*, 22 *Law J. N. S. Exch.*, 287; *Northampton Gas Co. v. Parnell*, 15 *Com. B.*, 651; *Faunce v. Burke*, 16 *Pa.*, 479). These cases fully establish the principle, that a man may by contract agree to waive his right to resort to the courts and to submit any question to private arbitration. This is precisely what the plaintiff did in this case. He agreed to submit all differences between himself and any other member to the arbitration committee. He may go further and make such submission a condition precedent. The authorities show that he can make it the condition of a right of action. He did agree that the tenure of his membership should depend upon it. It is entirely

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competent for him to do so. There is no legal objection to it.

V. On the previous argument it was suggested that the agreement to arbitrate might be void, or that consequences might follow, favorable to the plaintiff's right. The doctrine of the validity of agreements to arbitrate may be thus stated. An agreement in a contract to arbitrate is valid and binding on the parties (subject to a qualification to be noted), but in case the agreement contain a clause excluding the parties, or withholding the question from the courts expressly, that part of it is void (see the cases above cited). In an agreement to arbitrate, when the arbitration is not expressly made a condition precedent to an action, and when there is no clause withholding the question from the courts, the agreement is binding, except that the party may revoke his consent to the arbitration by express act, or, after the cause of action arises, he may bring an action instead of proceeding with the arbitration. The arbitration clause is collateral, and not a condition precedent. The party has concurrent remedies (*Roper v. Lendon*, 5 *Jur. N. S.*, 491). Where there is no civil action nor revocation, the arbitration is binding; and, where the party has had notice, or fails to attend, the arbitration may proceed *ex-parte* (*Scott v. Van Sandan*, 6 *Q. B.*, 237). And a protest waives the necessity of giving any notice (*In re. Morphet*, 10 *Jur.*, 546; *Nares v. Drury*, 10 *Law T. N. S. Exch.*, 305). When the arbitrator acquires jurisdiction of the person by due notice to him, he may proceed in his absence *ex-parte*, and the decision is as binding as if he had been heard.

VI. Now, under these rules, what is the plaintiff's position? He had agreed, by the constitution, that, when a claim or matter of difference arose against him, it should be the duty of the arbitration committee to take cognizance of and exercise jurisdiction over it. It was not a conditional agreement that, in case he elected to submit to arbitrate, they should be the tribunal; but a positive agreement that the committee should have jurisdiction of the subject-matter whenever it arose; and he further agreed

that their decision should be binding. For obvious reasons, and for purposes inherent in the whole nature and scope of their organization, the members contract between themselves for a special procedure in the performance of their contracts, and the ascertainment of defaults. Their business is such as to render prompt performance of contracts, and the immediate ascertainment of defaults, absolutely necessary. Their exclusiveness is in this point, that they are composed of those brokers only who do perform at the minute; others can do business elsewhere. Now there can be no prompt performance unless the questions, what performance requires, and what constitutes a default, can be determined speedily by themselves. With this exclusiveness they can rely upon one another, and in their instantaneous transactions, one member can accept the bid of another, with this simple reliance that he is a member. If here and there a defaulter mingles in the crowd, their business loses its reliance and is broken up. While a member is in default he must remain suspended. This is the vital principle of the association. These provisions do not interfere with any of the rights of property of the members, but they do justly bear upon the tenure of membership. There is no provision for the enforcement of the award. The party may perform or not, as he chooses, so far as the association is concerned; with this proviso, that, if he chooses not to perform, then his membership becomes suspended. There is no attempt here to enforce the payment of the award. All that is now in question is the tenure of the plaintiff's membership, after he has, in the judgment of the association, defaulted on his contract. 1. The moment Currie, Martin & Co., made claim against him, and he refused to acquiesce in it, the arbitration committee acquired jurisdiction of the *subject-matter*. 2. Due notice was given to him that they would hear the case; thus they acquired jurisdiction of the *person* of Mr. White. 3. He then had his option between two courses. He could submit to, and proceed before the arbitrators. Or he could stand on what he was advised were his legal rights, take the question away to the adju-

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dication of the courts of law, revoke his submission, or in any way disregard the arbitration. The only thing he did do was to serve a protest. This was not a revocation. The arbitration went on, the committee saw the documentary evidence, and decided against him. 4. Then he again had this election: He could perform, in which case the proceedings would have terminated. Or he could refuse to perform, on any ground satisfactory to himself, and accept the consequences—his suspension. His refusal to perform was followed by two inevitable consequences: His suspension was the result of his own act. And the fact of the default was ascertained, so far as the members of the association were concerned. 5. The first consequence was that he became chargeable with the defalcation intended by the by-laws. When that fact became known to the members of the committee of membership, as it did by a communication from Currie, Martin & Co., it became their duty to investigate it. This they did, and ascertained that it had been so adjudged by the arbitration committee. It was not made their duty to hear the parties on the merits; the action of a co-ordinate committee was conclusive as to that fact. The result of the regular application, to the plaintiff's case, of the rules of the association, was the report of this committee to the president, and the suspension. It was the necessary result of his own voluntary election to stand on his legal rights, and not to abide by the decision of the arbitration committee. It was perfectly competent for the members to contract that such a performance should be the condition of the continuance of membership, and that a violation of a rule should result in a suspension. He was bound by his contract, and having, in view of the result, chosen his course, he elects also the regular and necessary result. 6. The second consequence was, that, so far as it can come in question here on this question of his membership, the award is binding on him. No question arises here concerning the correctness of the decision against the plaintiff, either in point of law or in matter of fact. Where one's rights are thus submitted to a private tribu-

nal, there may be an action to relieve against *fraud*; for such a remedy may be had, not only as against the awards of arbitrators, but even against judgments of the highest courts (*Munn v. Worrall*, 16 *Barb.*, 227). But for *error of judgment*, however plain and palpable, there is no remedy; the party must abide the forum which he has selected; and he cannot have a writ of error or an appeal to the legally constituted tribunals (*Underhill v. Van Cortlandt*, 17 *Johns.*, 403, 412, 416, 421, 430; S. C. below, 2 *Johns. Ch.*, 361; 2 *Story Eq. Jur.*, § 51, *et seq.*; *Ketchum v. Woodruff*, 24 *Barb.*, 147; *Phillips v. Evans*, 12 *Mees. & W.*, 305). Currie, Martin & Co., the other parties to the contract, are not now before the court; no relief is asked upon the contract with them; they have no opportunity to answer or to be heard; and the merits of that controversy cannot be inquired into.

VII. It follows that the arbitration committee had full jurisdiction, and that the plaintiff's protest does not benefit him. 1. The arbitration committee had jurisdiction over the subject-matter; "it was a claim and matter of difference between members of the board." The constitution settled that. They had jurisdiction over the person. The plaintiff had notice, and refused to appear before them. That justified their proceeding *ex-parte*. In the absence of any rule for acquiring jurisdiction over the person, it must proceed upon the general principles by which courts of law acquire jurisdiction, by a writ from the court, a summons from the moving party, or a voluntary appearance of the defendant (*Innes v. Wylie*, 1 *Carr & K.*, 262). The protest served upon the arbitration committee, is a protest against the jurisdiction of the committee of arbitration, on the ground that no difference had arisen, and that there was no claim against him,—*i. e.*, that they had no jurisdiction of the subject-matter. It virtually concedes jurisdiction over the person. In this protest the plaintiff fails to see that, though it takes two to make a bargain, one can make a claim; and that, unless it be acquiesced in, a difference arises. He fails to discriminate between a non-existing claim (if the expression may

be used) and an unfounded one; he fails to see that while the groundlessness of a claim may be matter of defense, it does not warrant an exception to the jurisdiction. If his protest be construed as a refusal to submit to arbitration, then, as previously argued, he voluntarily accepted the alternative consequence—his suspension. If it be construed as a revocation of, or withdrawal from, the agreement to arbitrate in the exercise of a legal right, then his act must comprehend a withdrawal from the association, and a revocation of his signature to the constitution,—and thus he suspended himself. Because, this contract being entire, and not several or divisible, he cannot sever it to his advantage and continue to enjoy certain privileges that are agreeable, and reject a clause that may be onerous; nor would the rule be different if the part attempted to be severed were illegal and void (2 *Kent Com.*, 468).

VIII. This is an attempt by a member of an unincorporated association to procure from the courts the same remedies for the enforcement of his social privileges therein, according to its articles of association, that the courts, by mandamus and injunction, have been accustomed to afford to members of corporations. It assumes that the courts will recognize the agents and servants of this society, as they would the officers of a corporation, and will compel them to perform their official duties by compulsory process, issued in regular actions of the same nature as those allowed to corporations. 1. If this could be permitted, privileges of a social nature might be created by private compact, which the legislature has not seen fit to sanction, and our courts might be burdened with the task of enforcing them. The privileges of membership in ball, billiard, and ten-pin clubs, in political ward committees, in the prize ring, in the cock-pit, and in dog-fighting societies, would be enforceable by injunction and mandamus. There is no precedent for such a course, and no color in reason or good policy for making one. The subject-matter is not property, as a chattel, but a social right or privilege unknown to the law. 2. The relief asked in this ac-

tion, and afforded by the injunction is, that the plaintiff may have the full exercise and enjoyment of his rights and privileges as a member of the board, and that he may, at their meetings, transact all his business, in buying and selling stock, &c., fully, freely, and with the same facilities enjoyed by the other members, and as he enjoyed them previously to his suspension. Now this requires the court to interfere in the internal management of an association that has no legal existence, in favor of a member who has been suspended according to its rules, none of whose rights of property have been violated, in support of his purely personal and social rights against the other members, who have strictly followed their rules, and who have not been guilty of any misconduct. If the injunction be allowed, and the plaintiff stands in the board at its sessions and bids for stock, the selling member may (within the rules of the board, for the plaintiff is an adjudged defaulter there) refuse to sell to him. The injunction is violated. The plaintiff does not enjoy his previous facilities in buying and selling stock, nor the facilities of other members (for they cannot refuse the bid of a member in good standing), and without this facility his mere right to attend as a speculator is valueless. The correlative of the personal and social rights, in which he seeks to be upheld, are like personal and social services from the other members; and although the board may be sued in the name of its president in respect to property, and the members bound by this injunction, so far as it seeks to restrain them from interfering with the plaintiff's property, they are not bound in this action, in which they are not parties, to render to the plaintiff these personal and social services. 3. Even if every member were a party defendant, the court would not interfere to compel a member to take the plaintiff's bid, and will not, therefore, interfere to issue or enforce this injunction. 4. This injunction is, in fact and substance, mandatory and not prohibitory. The plaintiff's complaint is that he is excluded from membership. The effect of the injunction is to direct the defendants to perform to him all the services they did before

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the suspension—to give him the same relief pending the action that he would gain by final action in his favor. Such injunctions “the court will not grant, except under very special circumstances” (*Dan. Ch. Pr.*, 4th ed., p. 1503; *Hooper v. Brodrick*, 11 *Sim.*, 47; *Isenberg v. East India Ho. Co.*, 10 *Jur. N. S.*, 221; *Durell v. Pritchard*, 35 *Law J.*, 223). 5. The following cases abundantly show—That the courts will not interfere in the internal management of any association,—least of all, of those which have no legal existence. That they will not relieve against an arbitrary expulsion, where it has been made according to the rules. That they will look after rights of property, but not after personal or social rights, nor compel the performance of personal services (*Brown v. Monmouthshire Railway*, 13 *Beav.*, 32; *Bailey v. Birkenhead Railway*, 12 *Id.*, 433; *Exp. Ford*, 7 *Ves.*, 617; *Waters v. Taylor*, 15 *Id.*, 19, 21; *Carlen v. Drury*, 1 *Ves. & B.*, 154; *Thompson v. University of London*, 10 *Jur. N. S.*, 669; *Brancker v. Roberts*, 7 *Id.*, 1185; *Mair v. Himalaya Co.*, 11 *Id.*, 1013; *Chaplin v. Northwestern Railway Co.*, 5 *L. T. Rep.*, 601; *Churchward v. Chambers*, 2 *Fost. & F.*, 229; *Lumley v. Wagner*, 1 *De Gex, M. & G.*, 604; *Blisset v. Daniel*, 10 *Hare*, 493; 2 *Lindl. Partn.*, 828; *Hopkinson v. Marquis of Exeter*, *Lond. Times*, Dec. 21, 1867; *Commonwealth v. Pike Beneficial Society*, 8 *Watts & S.*, 250; *Commonwealth v. St. Patrick's Society*, 2 *Binn.*, 448; *Innes v. Wylie*, 1 *Carr & K.*, 262; *Lloyd v. Loaring*, 6 *Ves.*, 773; *Cullen v. Queensbury*, 1 *Brown Ch. C.*, 101).

IX. The machinery of suspension having been regularly set in motion, and the defalcation being a voluntary election between two courses, the plaintiff became suspended by the operation of his own contract. To keep him in by injunction involves this wrong. He claims to be kept in the association, in spite of a clause in his contract which, by its necessary operation, repels him; and that the association shall be kept in operation with this self-destructive element forcibly inserted. The result would be its destruction. If the court, upon any ground, nullifies the fundamental principle of the association that

their contracts must be performed according to their own rules, the destruction of the association is inevitable. As against all the other associates who have strictly adhered to the terms of their contract, it will not be equitable for the court to interfere in favor of one member who has broken them, to shield him from the consequences that, by his contract, follow his default. If the court should find any ground for interference, it would only be upon condition that he fully performed all the obligations on his part in his contract (*Charlton v. Poulter*, 19 *Ves.*, 148, *n.*; *Stockton v. Wedderburn*, 26 *Law J. Ch.*, 713).

X. The plaintiff has no grievance. The case arose which gave the arbitration committee jurisdiction over him. He had notice, and an opportunity to be heard. In his voluntary absence the case was heard on its facts and merits, and decided against him. His suspension was the regular consequence. He has appealed to the executive committee. That committee are ready to hear him, and have so notified him. There has, therefore, on the question of his suspension, been no final adjudication. The proceeding is pending, and it does not yet appear what may be the final result. The present suspension is temporary, and may be annulled.

BY THE COURT. — DALY, F. J. — The organization known as the Open Board of Stock Brokers, which the plaintiff asks this court to restrain from depriving him of his rights and privileges as a member of it, is not a partnership, and the plaintiff is not entitled, as has been argued, to the equitable remedies which courts afford for the protection of the rights of a copartner. It is not a union of persons joining together property, labor or skill for their common benefit, in any pursuit or business having a communion of profit or loss, and distinguishable by the feature that, if earned, there is to be division of gains. It may be described as an association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and

management of his separate transactions or business—which is not a partnership.

The objects of the organization are set forth in the articles of association, which declare that greater facilities are requisite for the exchange and negotiation of commercial securities, a business which can be successfully transacted only where there is the utmost confidence; that as such confidence is begotten only by public, open, fair and upright transactions, so that each party interested can know, not only where but how such business is done, the spirit of the age demands for such transactions a great public mart open to all; and that for the purpose of supplying these requirements the persons signing their names associate themselves together and adopt a constitution for an association, to be known as The Open Board of Stock Brokers, each pledging himself to abide by the constitution, and by all by-laws, rules, and resolutions which may be passed by the board. To carry out this object the constitution provides that there shall be a room where the members of the board shall have seats and desks, conveniently enclosed within a railing, and that outside the railing, and in a gallery, seats shall be provided for the public. Certain officers are designated who are to call stocks at the board; and a standing committee to arrange the order in which such securities are called. A record is to be kept by the secretary of all sales and purchases made at the board. He is required to prepare an account of the same for the newspapers, and no fictitious sales are to be allowed. It is, in fact, the creation of a public mart for the sale of stocks or other commercial securities, each purchase or sale of which is not for the joint benefit of the body, but is, as it would be in any other place, an individual transaction between the parties making it. It is analogous to what, in other branches of commerce, has long been familiarly known by the word "*Change*,"—a fixed place where merchants meet, at certain hours, for the transaction of business with each other; subject to such general rules or understanding as they think proper to be governed by. There may be property belonging to this body, derived

from the payment of dues or fines, or consisting of the furniture of the room where the board meets ; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation and not in the pew-holder ; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets (*St. James Club*, 13 *Eng. L. & Eq.*, 592 ; *Fassett v. First Parish in Boyleston*, 19 *Pick.*, 361). This board of stock brokers is in fact analogous to the organization which came under consideration in *Caldicott v. Griffith* (8 *Exch.*, 898,) called *Midland Counties Guardian Society for the Protection of Trade*, which was decided not to be a partnership. So far, therefore, as the plaintiff claims the equitable interference of this court upon the assumption that this association is a copartnership, or upon the ground that the rules which regulate the action of courts of equity in cases of partnership are to be applied to it, the claim cannot be supported.

It is not an incorporated body, and as a number of cases have been cited upon the argument in which courts of equity have interfered and restored a member of a corporation who had been expelled or obstructed in the exercise of his franchise by the acts of the corporation, which are relied upon by the plaintiff as authorities applicable to the present case, it will be necessary to inquire into the reasons why corporations cannot expel members except in certain extreme cases, and to show that these reasons do not apply to a voluntary unincorporated body, which comes into existence by the mutual agreement of the persons forming it, and is thereafter carried on under rules which the body adopts for its government. A member of a corporation, whether it be municipal, eleemosynary or private, is in the enjoyment of a franchise, the right to

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which is not derived from the body, but is created by statute or exists by prescription, and therefore cannot be taken away by the act of the corporation, except, as I have said, in certain extreme cases. As it is a right conferred by statute, or derived from immemorial custom which implies the existence of a grant, it can neither be taken away by the act of the corporation, or withheld by the act of the corporation, from any one eligible to the enjoyment of it. Thus, in *The People v. The Medical Society of the County of Erie* (32 *N. Y.*, 187), an incorporated medical society was compelled by *mandamus* to admit a licensed physician to membership, who was excluded under a by-law which had been adopted by the corporation.

In a corporation there is a distinction between what is called *amotion*, or the right to remove an officer, which is a power inherent in every corporation, and *disfranchisement*. The former may be exercised without interfering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an actual expulsion of the member from the body and the taking away of his franchise, which cannot be done unless the power is given by the charter creating the corporation, or the member has been guilty of crime, a conviction of which would work a forfeiture of all civil rights, including the corporate franchise, or has committed acts which tend to the destruction of the corporation, such as the defacing of its charter, the obliteration or alteration of its records, or other acts tending to impair or destroy its title to its rights or privileges; in which case, the expulsion of the member is but the exercise of a power incident to the right of self-preservation (*Evans v. Philadelphia Club*, 50 *Pa.*, 107; *Bagg's Case*, 11 *Coke*, 93; *Earle's Case*, *Carth.*, 173; *Commonwealth v. St. Patrick Benevolent Society*, 2 *Binn.*, 441; *Fuller v. Trustees of Plainfield Academy*, 6 *Conn.*, 532; *People v. Medical Society of Erie*, 24 *Barb.*, 570; *Willc. Mun. Corp.*, 270; *Grant Corp.*, 263-266.

But in an unincorporated, voluntary association, like the one now under consideration, the privilege of member-

ship is not given by statute, or derived through prescription, as in a corporation, but is created by and conferred by the organization itself. It is not a franchise—a franchise being a particular privilege vested in individuals, which is conferred by a grant from a sovereign or government (*Finch Law*, 164; 3 *Kent Com.*, 458), while, on the contrary, the privilege of membership in a voluntary association is derived exclusively from the body that bestows it, and may be conferred or withheld at its pleasure. The law cannot compel such an organization to admit an individual to membership, as may be done in the case of a corporation, nor can it interfere to restore a member who has been deprived of the privilege for not complying with the conditions upon which the enjoyment of it was made to depend. A member of a body of this description has, as such, undoubtedly rights which the law will protect, but they do not rest upon the same ground, and are by no means co-extensive with the franchise enjoyed by a member of a corporation. They depend upon the nature of the organization, upon the object for which it was formed, and upon the rules, regulations, constitution or by-laws which are explanatory of its purpose, and which the body has adopted for its government.

Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them—to have assented to them—and they are bound by them (*Innes v. Wylie*, 1 *Carr & K.*, 262; *Brancker v. Roberts*, 7 *Jur. N. S.*, 1185; *Hopkinson v. Marquis of Exeter*, *Lond. Times*, Dec. 31, 1867; 5 *Law R. Eq. Ca.*, 63).

Such an organization may prescribe the conditions upon which persons will be admitted to membership, as well as the conditions upon which the continuation of membership will depend; and where they have no regulation upon the subject they may expel a member by a vote of the majority, if he has been notified of the charge

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against him, and afforded an opportunity of being heard in his defense (*Innes v. Wylie, supra*). Voluntary bodies of this kind will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where a member is expelled in conformity with the rules, and the proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere (*Commonwealth v. Pike Beneficial Society, 8 Watts & S., 250*). The only question, therefore, that can arise in the present case, is whether the plaintiff was suspended from the privileges of a member of this Open Board of Stock Brokers in accordance with the constitution and by-laws which that body have adopted for its government; for if he was, he has no ground of complaint.

The by-laws of the board provide that whenever a member is in default in any contract, and the fact becomes known to the committee on membership, they shall, after due investigation, report the same without delay, through their chairman, to the president of the board, who shall at once declare the member so reported suspended from all the privileges and immunities of the organization; and that the member may, within sixty days, appeal, and demand a hearing before the executive committee, who are required to give notice at the board at least five business days before the hearing of the appeal, to enable any person interested to present objections. The executive committee are required by the by law to report the result of their investigations, and if it appears that the complaint is just, the declaration of suspension is to be confirmed, otherwise annulled. It is provided, in addition to this, by the constitution, that there shall be an arbitration committee, to take cognizance of and to exercise jurisdiction over all *claims* and all *matters of difference* between the members of the board, whose decision shall be binding. And the constitution further provides, that an appeal may be taken from the judgment of the arbitration committee to a board of appeals—which board, it is declared, shall take cognizance of all cases

of appeal from the judgment of the arbitration committee.

The plaintiff had a contract with the firm of Currie, Martin & Co., who are also members of the board, for the purchase by them from the plaintiff of 1,000 shares of the Hudson River Railroad stock, to be delivered at the plaintiff's option, at any time during the year 1867. After the making of this contract the Hudson River Railroad Company adopted resolutions increasing the capital stock of the company—in which they provided that the persons in whose names stock should be standing on the 10th of April, 1867, might, before the 15th of the month, subscribe for an equal amount of the additional stock, at one-half its par value. Currie, Martin & Co. claimed that, under the contract, the plaintiff was bound to subscribe for 1,000 shares of the additional stock for them, insisting that they were rightfully entitled, under the contract, to the benefit of the increase; but this claim the plaintiff refused to admit. By the conditions of the contract, either party were entitled to call for additional deposits, from time to time, to meet the fluctuations in the market; and by a by-law of the board, either party, upon all time contracts, may call, at any time during the continuance of the contract, for a united deposit of ten per cent.; and if either party fail to comply, the other may elect to close the contract.

Currie, Martin & Co. made a call upon the plaintiff for an additional deposit of ten per cent., making an additional deposit of the amount themselves; but the plaintiff refused to make any additional deposit—whereupon Currie, Martin & Co. elected to close the contract, and notified the plaintiff that they would purchase 2,000 shares of the stock for his account and at his risk, under another by-law of the board, which provides that if any member neglect to fulfil his contract after being duly notified, the other party may employ any one of certain designated officers of the board to buy or sell the stock, as the case may be, either in open market or at the board, accounting to the member in default for any surplus, and

charging him with any deficiency. Upon receiving this notice from Currie, Martin & Co., the plaintiff sent a notice to the president of the board protesting against the purchasing of any stock upon his account, under the contract, claiming he was not in default; but the president complied with the request of Currie, Martin & Co., and purchased 2,000 shares, and Currie, Martin & Co. notified the plaintiff of the purchase as a purchase under the rule, upon his account and at his risk; which purchase was made at a rate creating a difference in their favor, and, as they insisted, against the plaintiff, of \$69,633.34.

This sum, Currie, Martin & Co. claimed of the plaintiff, and he refused to pay it, whereupon they brought the claim, as a claim and matter of difference under the provision in the constitution heretofore referred to, before the arbitration committee, demanding that they should inquire into and decide it; and the committee appointed a day for the hearing, and notified the plaintiff to appear before them and interpose whatever objection or defense he might have; to which the plaintiff replied by a written communication, declining to appear before the committee, protesting against their jurisdiction in the matter, and declaring that no matters of difference had arisen between him and Currie, Martin & Co.; that that firm had no claim of any kind against him; that the contract made with them was in full force and effect; and that nothing had arisen under it calling for any action of the arbitration committee.

Upon the day appointed, Currie, Martin & Co. appeared before the committee, and the plaintiff did not. The former presented their claim, and gave evidence of the facts upon which it was based, and the committee, by a report or award in writing, decided that Currie, Martin & Co. were entitled, under the contract, to 1,000 additional shares of the stock, having notified the plaintiff that they elected to subscribe for the same; that the plaintiff was in default, having failed to respond to Currie, Martin & Co.'s call for an additional deposit; that by the by-laws it was, after such default, at the option of

Currie, Martin & Co. to elect to close the contract, and that they did elect to close it; and the arbitration committee rendered, as they expressed it, judgment in favor of Currie, Martin & Co., and against the plaintiff, for the sum of \$69,633.34.

Currie, Martin & Co. then made known to the committee on membership the decision of the committee on arbitration, and the committee on membership, upon due investigation, as it is averred in the answer, reported to the president that the plaintiff was in default upon his contract with Currie, Martin & Co., upon which the president declared him suspended from his privileges as a member of the board. The plaintiff appealed from the act of the president to the executive committee—but before any decision was had upon this appeal, he brought this action to restrain the president and the members of the board, by injunction, from interfering with him in “the full and free exercise and enjoyment of all his rights, privileges and franchises” as a member of the body. He avers in the complaint that he has daily and repeatedly urged upon the president the calling of the executive committee together, and the granting to him of a hearing, but has been unable to procure it from the failure of a quorum to attend; and alleges, upon information and belief, that the failure and delay were at the instigation of Currie, Martin & Co., and were a part of a general plot on their part, and other members of the board, to deny him justice, and prevent him enjoying his privileges as a member; while the president avers in his answer that he took measures to call the committee together, but that the plaintiff brought this action before a meeting could be had—before it was possible to give any kind of reasonable notice to the members, and before the committee could give the notice required by the by-laws; so that this averment on the part of the plaintiff of an intentional delay, which he makes upon information and belief, must be regarded as substantially denied; in addition to which, the president avers that after the service of the preliminary injunction, a meeting of the com-

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mittee was had, and that the plaintiff was notified that they were willing and desirous that he should appear before them and have a hearing, and that he appeared before them, after consulting with his counsel, and refused to prosecute his appeal, protesting against and forbidding the committee to take any action in the matter.

The effect of this award made by the arbitration committee has been elaborately discussed upon the argument; but many of the points raised do not and cannot come under consideration here. Currie, Martin & Co. are not defendants in this action, nor is this a proceeding to confirm the award and for judgment in accordance with it. We are not called upon, therefore, to say whether it did or could have any effect upon the legal rights of the parties to the contract for the purchase of the stock; nor whether the by-law of the board, under which the committee acted, had the same effect as an ordinary submission in writing of a matter in difference to arbitration, so as to be conclusive upon the parties upon the award being made; nor whether the protest of the plaintiff was a revocation of the submission which, in an ordinary arbitration, is a right which either party may exercise at any time before the matter is finally submitted, upon a hearing, for a decision of the arbitrators. The action of this committee comes under consideration here merely as a part of the proceedings by which it was determined that the plaintiff should be suspended from the privileges of a member of the board, and it is only in that light that I shall consider it.

The constitution declares that the by-laws shall provide for the expulsion, suspension and readmission of members for cause, and the by-laws declare that a member's being in default in any contract shall be a cause for suspension. The committee on membership, when it is made known to them that a member is in default, are, upon due investigation, to report the fact to the president, who must thereupon declare the member suspended, leaving him his rights of appeal to the executive committee; and, as I understand the law, the further benefit of

the judgment of the whole body, when the executive committee report the result of their investigation.

The by-law having provided a mode for reviewing and correcting any error or injustice on the part of the committee on membership in reporting to the president that the plaintiff was in default, he was bound to avail himself of the remedy provided by the constitution and by-laws of the body of which he had become a member, before he can ask a court of equity to investigate a proceeding not necessarily final in the body itself, but which was there subject to review, and might be annulled by the action of a committee expressly clothed with authority to investigate it (*Carlen v. Drury*, 1 *Ves. & B.*, 154).

He must, in consonance with the rule upon which Lord ELDON acted in the case above cited, resort to the remedy which is provided by the constitution and by-laws of the association itself, before he asks a court of equity to interfere—unless by evasion, intentional delays, or other unjust procedure, he is practically deprived of the benefit of that remedy—which in this case is substantially denied by the answer.

It is averred in the answer that the committee on membership reported the plaintiff to be in default, upon due investigation—and this is all that is required under the by-laws to authorize the suspension of a member by the president. The by-law does not provide how this investigation shall be made, but the law will intend that it means an investigation on the part of the body, in which the member to be affected shall be afforded an opportunity of being heard. What shall or shall not constitute a default upon a contract, so far as it affects the continuance of membership, is a matter which a body like this has the right, in my judgment, to determine for itself; and when it acts in good faith, and the investigation is conducted in the mode prescribed by the constitution and by-laws, no judicial tribunal would assume the right to reverse and set at naught its decision. As the constitution and by-laws have provided for a standing committee,

who are to take cognizance of and exercise jurisdiction over all claims and matters in difference between members, and whose decision is to be binding upon them, that would seem to be the appropriate tribunal in this body to investigate and decide whether a member is or is not in default—the more especially as provision is made for reviewing and correcting the decision, if erroneous, by an appeal to another tribunal of the board, called the board of appeals. When a claim, therefore, is made by one member upon another, and he brings the matter in difference before this arbitration committee, and they, after having notified the other, and afforded him the opportunity of being heard, investigate the claim, and decide that the other party is in default, that is, in my judgment, a “due investigation” within the meaning of the law. It never could have been the design of the by-law that the committee on membership are also to sit in deliberation upon the matter, and investigate it over again, before they are authorized to report to the president that the member is in default. It is due investigation on their part when they inquire and ascertain that the arbitration committee, whose decision is binding and subject to review, have decided, in a matter legitimately before them, that a member is in default. A second investigation would be superfluous, and was not, in my judgment, contemplated by the by-law.

The plaintiff avers, upon information and belief, that some of the members of the arbitration committee were already prejudiced against him, having repeatedly expressed an opinion favorable to Currie, Martin & Co.; to which ground of complaint there are several answers. In the first place, this allegation is too general and indefinite. The names of the members referred to are not given. It is not known whether they are or not defendants in this suit; so that this allegation is incapable of a specific denial by answer on the part of those who could alone make it; in addition to which, the president, in his answer, denies, so far as he has any knowledge or information, that any member or officer of the board has at any time taken

any side or combined, or in any manner acted with or at the instigation of Currie, Martin & Co. against or to the prejudice of plaintiff, or *interfered in any way or manner*, except so far as the constitution and by-laws required them to.

In the second place, the plaintiff did not, when notified to appear before the committee, place his objection upon any such ground, but his written protest against the action of the committee was put upon the ground that no matter of difference had arisen between Currie, Martin & Co. and himself; that that firm had no claim against him of any kind, and that nothing has arisen under the contract calling for the action of the committee; in which he was mistaken; for a matter in difference had arisen between him and Currie, Martin & Co., and he and they differed in their understanding of the contract. They acted upon their construction of it, and the result was a claim by them against him, under it, for a large sum of money, which claim they brought before the committee—the committee having, under the constitution, cognizance over all claims between members, so that something had arisen calling for the action of the committee.

And, in the third place, if some of the committee were, as the plaintiff supposes, prejudiced against him, and had, before taking any action in the matter, expressed opinions favorable to Currie, Martin & Co., the action of the committee was not final. The plaintiff could have appealed from their decision, if it were erroneous or unjust, to the board of appeals, and he should have resorted to the remedy provided for him within the board, before he could ask a court of equity to interfere upon the ground that the arbitration committee were prejudiced against him.

For these reasons I am of the opinion that the proceedings upon the plaintiff's suspension were regular; that they were in accordance with the constitution and by-laws; that nothing has been shown that would authorize this court to interfere; and that Judge VAN

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VORST was right in dissolving the injunction at special term.

BRADY, J., concurred.

BARRETT, J., having been of counsel in the cause, while at the bar, took no part in the decision.

McCLURE *against* THE SUPERVISORS OF NIAGARA COUNTY.

Court of Appeals ; September, 1867.

APPEAL. — ORDER ALLOWING COSTS.

An order of the general term, affirming an order of the special term allowing and adjusting costs, is not appealable to the court of appeals.

It seems, that the provisions of *Laws of 1859*, ch. 262, § 2,—that no costs, &c., shall be recovered against a municipal corporation unless the claim was presented for payment to the chief fiscal officer of the corporation, before the suit,—does not apply to actions for unliquidated damages arising *ex delicto*;—*e. g.*, to a claim for damages for property destroyed by a mob.

Appeal from an order.

G. D. Lamont, for the appellants.

P. L. Ely, for the respondent.

DAVIES, Ch. J.—In the supreme court the plaintiff recovered judgment against the defendants, and the costs were adjusted by the clerk at the sum of \$206.77. The defendants appealed therefrom to the special term, where such allowance and adjustment were affirmed, and that

order was affirmed at the general term. From this order the defendants appeal to this court.

The defendants claim that the plaintiff is not entitled to costs, by reason of the provisions of section 2 of chapter 262 of the laws of 1859. That section declares, that "no costs, fees, disbursements, or allowance shall be recovered or inserted in any judgment against municipal corporations, unless the claim upon which such judgment is founded, shall have been presented for payment to the chief fiscal officer of such corporation, before the commencement of an action thereon."

The suit is brought for damages sustained by the plaintiff for the destruction of her property by a mob or riot, and to enforce the liability of the county therefor, under chapter 428 of the laws of 1855.

The claim upon which the action was founded was not presented for payment to the county treasurer of Niagara county, nor to any officer of the county, nor to the board of supervisors of said county, before the commencement of the action thereon.

The order is clearly not appealable to this court. It is not a final order affecting a substantial right in an action after the judgment. It is part of the judgment itself; and if appealable at all, is reviewable by this court only upon an appeal from the judgment. It is not an order which in effect determines the action and prevents a judgment. The case of *Clarke v. City of Rochester* (34 N. Y., 355), is quite decisive of this view; and the appeal should therefore be dismissed, with costs.

I think that upon the merits the order should be affirmed. This provision in the act of 1859, was clearly intended to protect municipal corporations from the payment of costs for demands which in their nature were capable of audit, and which the authorities were authorized to pay on presentation and adjustment. The intent of the statute is plain. It could never have contemplated that claims sounding in damages, the amount of which could only be ascertained by an investigation and the examina-

tion of witnesses, should have been presented for payment before suit brought.

Two questions would always immediately arise: 1. The corporate liability; and 2. The amount of damages. A claim of the character like that in controversy in this action is not within the meaning and intent of section 2 of the act of 1859. Such were the views of this court in the case of *Howell v. City of Buffalo* (15 *N. Y.*, 512). The charter of that city contained a similar provision to that found in section 2 of the act of 1859. The plaintiff sued the corporation of Buffalo for taking and conveying away and converting to its own use certain bank notes, of the value of \$355, the property of the plaintiff. The provision in the charter was: "It shall be a sufficient bar and answer to any action or proceeding in any court, for the collection of any demand or claim, that it has never been presented to the council for audit or allowance." It appeared that the demand or claim of the plaintiff had never been presented to the council for audit and allowance, and the corporation claimed that consequently the plaintiff was not entitled to recover.

The court held that claims arising *ex delicto* were not required, by this section of the charter, to be submitted for examination and audit to the common council before action brought.

We are cited to a decision of the general term of the second district (36 *Barb.*, 226), holding a contrary doctrine. That court was of the opinion that the provisions of section 2 of the act of 1859 were applicable to claims on account of the negligence or misconduct of the city authorities, as well as to demands upon contract.

This learned court does not seem to have had its attention called to the case of *Howell v. City of Buffalo* (*supra*). If it had, we are to assume its decision would have been conformed to it.

We cannot regard this case as an authority for departing from the principle enunciated by this court in the case of *Howell v. City of Buffalo*; and if we were called upon to pass upon the merits of the order appealed from, we should

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have no hesitation in standing by the doctrine there laid down, and holding that this second section of the act of 1859 did not apply to a claim of the character presented in this action.

The appeal should be dismissed, with costs.

All the judges concurred.

Appeal dismissed.

BARNEY *against* WORTHINGTON.

Court of Appeals; September, 1867.

AUTHORITY TO DRAW BILL.—SUFFICIENCY OF COMPLAINT.

Although a letter be addressed to a single member of a firm, yet if, when read in the light of attendant circumstances, it appears to have been intended to authorize an act of the firm, it will be sufficient to confer authority upon the firm.

Proof of the attendant circumstances is admissible to explain the letter.

An unqualified authority to draw a bill of exchange may be equivalent to an unconditional promise to pay such bill, upon which the drawee may be holden as upon an acceptance.

It is not necessary that a complaint on a bill of exchange drawn under a promise to accept such bill when drawn, should aver an acceptance. A complaint which avers the promise to accept, and the refusal, is sufficient, in that respect.

Appeal from a judgment of the superior court of the city of Buffalo.

The action was brought by Freeland T. Barney, Lester S. Hubbard, and William Durbin, against Samuel Worth-

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ington, to recover the amount due on a draft drawn on the defendant by Burton & Hubbard, and discounted by the plaintiffs.

The complaint contained three counts: two upon a promise to accept and pay each bill; a third for money lent.

On the trial of the cause, the following facts, among others, appeared. The firm of Burton & Hubbard was composed of Marshal Burton and Lucius F. Hubbard. They were in the produce and shipping business in the State of Ohio. They were in the habit of consigning their produce to the defendant, who was a commission merchant at Buffalo, and drawing drafts against it, which he had always accepted. He had made advances to them, prior to the date of the draft, to an amount several thousand dollars in excess of the estimated value of the property he had received as their consignee; but this fact was unknown to the plaintiffs.

On November 14, 1860, two days before the date of the draft, Lucius F. Hubbard, one of the firm, was at the defendant's office in Buffalo. The defendant wished them (Burton & Hubbard), to furnish him some money. Hubbard replied that it would be impossible without his assistance. The defendant asked Hubbard if they could raise some money at the West. Hubbard said they probably could by making drafts on the defendant payable in New York; and if the defendant thought it best, he would write to his partner to make such drafts. The defendant told him he had better do so. Hubbard said that, in order to raise money in that way, it might be necessary to have his acceptance or letter of credit, to show that he would accept the paper. The defendant replied that this would not be necessary; that he would write to Burton and arrange all that. Hubbard suggested that the paper should be made payable at Ketchum, Son & Co.'s, or at the Union Bank. The defendant left that to their preference; and directed them to make the drafts for \$2,500 or \$3,000 at first, and to send the proceeds to him.

The defendant afterwards told Hubbard that he had

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written to Burton to make drafts on him, payable in New York, and raise money on them. The letter was as follows :

BUFFALO, *November 14, 1860.*

“M. BURTON, Esq. :

“DEAR SIR:—Mr. H. has written you the state of things here. We have shipped all we could, and sold the balance. Now, in order to get along, and put up the necessary margins here which New York houses will require, it will be necessary to have more ready funds. Our banks are tightened up, and throw off all the customers they can. I have given them the canal bills, without consignees as yet, and am waiting to hear from W., and R. H. & Co.

“You will make your draft for \$3,000, or two drafts for \$2,500 each, on as long time as you can, and forward the funds as early as you can, as I must on the 18th arrange a portion of the drafts here.

“I hope markets will improve and pay well for the expense and trouble we are to in getting this grain forwarded. Don't delay in arranging and remitting.

“Yours truly,

“S. K. WORTHINGTON.”

It was proved that the drafts or acceptances referred to in the letter, which the defendant had to meet, were personal papers of his own, with which Burton & Hubbard had nothing to do, and that there were no outstanding drafts by them; and the last of his acceptances for them had been paid by him twelve days before the letter was written.

The defendant, who was sworn on the trial, admitted that his dealings were with the firm; that he never had any individual transactions with Burton, and that there was no arrangement for his making any individual draft upon him.

On receiving the letter of the defendant, with one from Hubbard, Burton went on November 16, to the plaintiff's, who were bankers at Sandusky; made a draft, in the

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name of his firm, on the defendant for \$3,000, payable sixty days after date at the office of Ketchum, Son & Co., New York; communicated to them the contents of defendant's letter, and the fact that the proceeds were to be remitted to him, and they thereupon discounted the draft on the faith of the defendant's responsibility. The defendant admitted that he received the proceeds, and that he supposed them to be the avails of this draft, at the time he received them.

Specific objections were taken to the introduction of the letter and the draft, and to the admission of parol proof of the antecedent and surrounding circumstances; and exceptions were duly taken to the several rulings of the court.

The judge found, in substance, the following facts: On November 14, 1860, the defendant, in writing, directed and empowered Burton & Hubbard to draw upon him the draft in question; and such direction and authority were intended by him as a letter of credit to enable them to procure the draft to be discounted. On November 16, Burton & Hubbard procured it to be discounted; and the discount was made on the faith of such direction, authority, and letter of credit. The proceeds were paid to the drawers, and remitted by them to the defendant. On due presentation of the draft he refused to accept it, and he afterwards refused to pay it at maturity. The judge gave judgment in favor of the plaintiffs for \$3,113.75, the amount of the draft, with interest.

This judgment was affirmed on appeal to the general term, and from the judgment of affirmance the defendant now appealed.

John Ganson, for the appellant.

John S. Talcott, for the respondents.

PORTER, J.—The letter of the defendant, though addressed to the partner who happened to be at home, was evidently intended to authorize a draft by the firm. It is to be read in the light of the surrounding circumstances,

proof of which was properly admitted, to aid the court in ascertaining the purpose of the paper, and in applying and interpreting its language (*Hutchins v. Hebbard*, 34 *N. Y.*, 24; *Agawam Bank v. Strever*, 18 *Id.*, 509; *Blossom v. Griffin*, 13 *N. Y.* [3 *Kern.*], 569; *French v. Carhart*, 1 *N. Y.* [1 *Comst.*], 102).

The defendant was substantially the borrower. *Burton & Hubbard* were indebted to him on open and current account, but they had no available means of payment. His own paper was maturing, and he wished to borrow in Ohio, for his use, what he could not obtain at home in the then stringent condition of the money market. They told him they could not obtain the loan without the aid of his credit; and he accordingly furnished them with a written authority to make the draft, for the precise purpose of giving credit to the paper, of which he was to receive the proceeds.

The judge seems to have been of opinion that as there was no agreement, *in terms*, to honor the draft, the transaction did not amount to an unconditional promise of acceptance within the meaning of the statute. He held, however, that the defendant was responsible, as upon a *letter of credit*, on the faith of which the plaintiffs made the discount. In a rigid and technical sense, that name may not be strictly appropriate; and yet, in view of the intention with which the letter was written, and the purpose for which it was to be used, the designation can scarcely be called a misnomer. In its substantial office, the writing was really a letter of credit; but it was also something more. In view of the peculiar circumstances under which it was given, the defendant's unqualified authority to draw on him for the amount was equivalent to an unconditional promise to pay the draft. The absence of technical promissory words is of no practical moment, where the language employed is such as to raise an imperative legal obligation (*Bank of Michigan v. Ely*, 17 *Wend.*, 508, 512; *Ulster County Bank v. McFarlan*, 5 *Hill*, 432).

The objection that the complaint is insufficient to up-
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hold the judgment is one which we cannot sustain. It is based on the statutory provision that a written and unconditional promise to accept a bill, before it is drawn, shall be deemed an actual acceptance, in favor of a party purchasing on the faith of such an engagement. This provision was not designed to prescribe a form of pleading, but to furnish a rule of judgment. Under our present system, a plaintiff is at liberty to state, in his complaint, the actual facts which raise a cause of action in his favor. In the present case, the plaintiffs alleged the promise made by the defendant, and his refusal to perform it; they proved the truth of what they averred; and they deduce their title to judgment through a statute which makes these facts conclusive in support of their legal right.

All the judges concurred.

Judgment affirmed.

*affirmed
1 May 1868*

LOESCHIGK *against* ADDISON.

New York Superior Court; General Term, January, 1868.

VOLUNTARY CONVEYANCE. — ASSIGNMENT BY SURVIVING PARTNER.

A voluntary conveyance is not void, as against *subsequent* creditors, unless it was made with *actual intent* to defraud.

Fraud, in such conveyance, will not be inferred from the want of consideration; but the burden of proving the intent is upon the creditor who impeaches the conveyance.

A surviving partner, has power, as such, to make an assignment of assets of the firm for the benefit of creditors, and to give preferences in such assignment.

Appeal from a judgment at special term dismissing the complaint.

This action was brought by certain judgment-creditors of the former firm of Addison Brothers, composed of Joseph and Samuel D. Addison, to set aside certain transfers of property made by Samuel D. Addison, as surviving partner of that firm.

The complaint alleged the recovery of two judgments against Samuel D. Addison, as survivor of Addison Brothers, in June and July, 1861, upon an indebtedness accruing prior to July, 1860. That the credit was obtained upon the representation of said Addison that the firm had a capital of \$45,000, and a considerable expectancy upon the death of their mother. That prior to such representations, Samuel D. had conveyed his interest in his father's estate to his father-in-law, the defendant Hatfield, for the pretended consideration of \$10,000, but that the consideration was in fact only \$10. That Hatfield conveyed the same to Rachel A. Addison, the wife of Samuel D. That at the time of such conveyance, as plaintiffs were informed and believe, Samuel D. was indebted in the sum of \$80,000, and that Addison Brothers from that time continued to be largely indebted (at no time less than \$80,000), until their failure, in February, 1861. That in June, 1860, Addison and wife conveyed real estate in Warren-street, Brooklyn, to Jacob Campbell, Jr., purporting to be for the consideration of \$6,000, and in November, 1860, they conveyed other real estate in Warren-street for the expressed consideration of \$4,000. That Addison was living in a house valued at \$16,000, in Wyckoff-street, Brooklyn, alleging that it belonged to his wife. That this house was conveyed to the wife by James Campbell, Jr., in exchange for lots in Warren-street. That this conveyance was made with intent to defraud the creditors of said Samuel D., by putting the same in the name of his wife. That in February, 1861, said Samuel D., as survivor of the firm, transferred goods and merchandise of the firm, invoiced at \$65,000, to the

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defendants Hatfield and Marshall, and shortly afterwards assigned to them certain choses in action of the firm in the hands of the Pacific Bank as collateral security ; the surplus over the indebtedness being upwards of \$16,000. That in February, 1861, said Addison assigned to said Hatfield three agreements of lease of premises known as 40 Murray-street, New York, expiring May 1, 1864, at a rent of \$5,000 per annum, which were rented to other persons at \$6,500—the value of which leases was \$1,875. That Hatfield paid no value, and that the assignments were fraudulent and void.

The complaint alleged these several conveyances and transfers to be fraudulent and void ; and demanded that they be set aside, and that a receiver be appointed to dispose of the property, and pay the plaintiffs' judgments.

The several answers of the defendants denied all fraud.

The action was tried by Mr. Justice MONCRIEF without a jury, who found as facts the recovery of the plaintiffs' judgments, the death of Joseph Addison, in February, 1861, and of Samuel D. after the commencement of this action, and that Rachel A., his wife, was appointed administratrix of his estate. He further found that the conveyances to Rachel A. were voluntary, and were executed for the purpose of conveying the real estate to Rachel, but were made in good faith and without any intent to hinder, delay, or defraud creditors, and were valid, as against the plaintiffs.

He further found that after the death of Joseph Addison, Samuel, as the survivor, by bill of sale, sold and transferred to Hatfield & Marshall the stock of goods and merchandise of Addison Brothers. That said Samuel also transferred the several leases of premises in Murray-street to said Hatfield, which leases said Hatfield subsequently transferred to Collins in consideration of \$1,350, paid by Collins to him. That said Samuel D., as such survivor, transferred to Hatfield & Marshall, certain choses in action, then held by the Pacific Bank as collateral security, as indemnity against certain actions of re-

plevin brought against Hatfield & Marshall to recover portions of the goods transferred to them as above stated. And he found that all the foregoing conveyances, assignments, sales, and transfers were made in good faith, and without any intent to hinder, delay, or defraud any of the creditors of Addison Brothers, or of said Samuel D. Addison.

The justice therefore dismissed the complaint as to all the defendants with costs; and the plaintiffs appealed from this judgment.

William Watson, for the appellants.

A. R. Dyett, for the respondents.

MONELL, J.—The conveyances of Rachel A. Addison, although voluntary, having been made prior to the debts contracted to the plaintiffs, were valid as to them. Whatever may be the effect of a voluntary conveyance as regards creditors existing at the time the conveyance was made, it is not void as to subsequent creditors, unless made with an *actual* fraudulent intention. The want of consideration is not of itself sufficient evidence of such fraudulent intent: the burthen of proving actual fraud always rests with the creditor.

In this case no evidence of such actual fraud was offered or given, unless it is claimed that the admission of the defendants, that, at the time the conveyances were made, which was three years prior to the contraction of the plaintiff's debt, Samuel D. Addison, the husband and grantor of Rachel A., was in debt to the amount of \$75,000, was some evidence of such actual fraud. But no proof was offered or given to show that such debt exceeded his ability to pay, or that they existed when the debt to the plaintiff was contracted, both of which, it seems to me, it was necessary to show to taint the transaction with actual fraud.

The finding, therefore, that the deed to Mrs. Addison was valid, was correct, and cannot be disturbed.

The transfers to Hatfield & Marshall are attacked upon

- two grounds : 1. The want of power in Samuel D., as the surviving member of the firm, to make the transfer ; and, 2. That they tended to hinder or delay creditors.

The last objection is easily disposed of. Hatfield & Marshall were creditors of Addison Brothers, and the transfer of the goods to them was in payment or towards payment of an existing debt. They were, therefore, purchasers for, as appears, a good and sufficient consideration. It is not alleged, nor was it proved, that the goods transferred were of greater value than the debt due. On the contrary, the answers allege that they were not sufficient to satisfy the debt. The assignment of the leases and the transfer of the residuum of the collaterals held by the Pacific Bank, were for further security and indemnity. No inadequacy of consideration was proven ; nor was there any evidence that either of the defendants realized any thing from the assigned property beyond the amount of the debt and liability it was intended to satisfy. It seems to me, therefore, that the defendants, Hatfield & Marshall, must be regarded as purchasers for a valuable consideration, and are brought within the exception contained in section 5, of title 3, chapter 8, of part 2 of the Revised Statutes.

The remaining question deserves a somewhat more extended examination.

The transfers to Hatfield & Marshall were made by a surviving member of the firm ; and it is claimed that inasmuch as the death of one of the partners worked a dissolution of the partnership, the functions and powers of the survivor ceased, except for the purpose of paying debts and settling the business of the firm ; and, therefore, that such survivor has no power to incur any new obligation, or contract any new debt in the name of the partnership, or give any preference in the payment of debts.

The death of Joseph Addison invested his survivor with the exclusive right of possession and management of the whole partnership property and business, for the purpose of settling and closing it up. He became trustee for all concerned in the partnership ; for the representatives of

his deceased partner, for the creditors of the firm, and for himself (Case v. Abeel, 1 *Paige*, 393); and, having the right to collect and dispose of the property, he had the power for that purpose of assigning any chose in action or property belonging to the estate (*Pars. Partn.*, 441; Pinckney v. Wallace, 1 *Abb. Pr.*, 82), he was primarily liable for the debts of the firm, and could hold possession or dispose of the property to satisfy such debts; and the representatives of his deceased partner could neither claim nor take any portion of it until after a settlement of the entire liabilities of the firm. These general principles are elementary and well established.

But it is insisted that the power of a survivor is not sufficient to authorize the giving a preference to one creditor over another.

It may be a question whether creditors at large have any such equity as entitles them to object to a transfer made in good faith, of a portion of the partnership property, to a creditor, in satisfaction of his precedent debt. It is clear, I think, that the representatives of the deceased partner could not object, and creditors have no equities except such as arise from the equities of the partners themselves, or their representatives. Before dissolution, one partner can, even without the consent of the other, apply the partnership funds to the payment of one creditor in preference to another.

And this power extends beyond the period of the partnership, and exists after dissolution, if exercised in good faith; for such act is in discharge of the duty of the partner to wind up the whole partnership concerns, and to divide the surplus among them after all the debts are paid (Goertner v. Trustees of Canajoharie, 2 *Barb.*, 625, 628). The only restriction upon this general power is, that *before* dissolution, one partner cannot, without the consent of his copartner, appoint a trustee for the partnership, by a general assignment of the partnership effects for the benefit of creditors, and giving preferences. (Havens v. Hussey, 5 *Paige*, 30; Kemp v. Carnley, 3 *Duer*, 1).

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But I have not found a case where, either before or after dissolution, the power to pay one creditor in preference to another has been denied. In *Fox v. Hamburg* (*Cowp.*, 445), Lord MANSFIELD held that even after an act of bankruptcy, committed by one partner, an assignment, *bona fide*, of partnership effects by the solvent partner to a creditor of the firm, in payment of his debt, was binding on the firm. And in *Milliken v. Loring* (37 *Me.*, 408), the same doctrine is applied to an assignment by one partner, to a creditor, after dissolution. Numerous cases uphold the power as well after as before dissolution (*Egberts v. Woods*, 3 *Paige*, 517; *Mills v. Argall*, 6 *Id.*, 577; *Fisher v. Murray*, 1 *E. D. Smith*, 341; *Hitchcock v. St John*, 1 *Hoffm. Ch.*, 511). In *Hitchcock v. St. John* (*supra*), Vice-Chancellor HOFFMAN says: "A direct payment of money or a transfer of property to an acknowledged creditor, is an admitted and a necessary power during the existence of the partnership. We are probably compelled by the authorities to go so far as to say that it is a necessary surviving power *after a dissolution, in whatever way that is effected.*" To the same effect is *Darling v. Marsh* (22 *Me.*, 184).

In *Egberts v. Wood* (*supra*), an assignment was made by one of two surviving partners of all the debts, choses in action, and securities of the copartnership, *upon trust to pay certain preferred creditors*, and the chancellor held this language: "The legal interest in all the assigned property was in the surviving partners, and at law they alone were chargeable with all the debts of the firm. They had, therefore, the right, without the consent or concurrence of the representatives of Lusk, to appropriate the property for the payment of the debts of the firm, in such manner, *and by giving such preferences* as they might think proper. The decedent had no interest in the question as to what debts should be paid first, in case the partnership effects are insufficient to pay the whole, and the legal title being invested in the survivor, he alone has the right at law to determine that question." The assignment in that case was of choses in action only, but the rule ap-

plies as well to assignments of other personal property (*Pars. Partn.*, 441; *Rays v. Vilas*, 10 *Wis.*, 169).

It is not necessary to stretch the power of a surviving partner to sustain the transfers made in this case. The assignment of the goods in store and merchandise of the firm was in payment of a pre-existing debt due to Hatfield & Marshall, and the transfer of the leases and of the collaterals held by the Pacific Bank, were intended in part to secure these defendants against a possible loss, for which the firm would have been held liable. The right to the property was involved in the suits brought by creditors, and the vendor was bound to protect the title.

It will be seen, therefore, that the consideration was ample to sustain the transfers, and there is no proof of any fraudulent intent anywhere, to violate them. It is a question solely of power in a surviving member of a partnership to make a preferential transfer of the partnership property to a favorite creditor; and I think I have abundantly shown, by numerous cases, that the power exists.

The fraudulent representations alleged to have been made by the debtors, and which induced the credit, do not seem to be urged as a reason for setting aside the conveyances or transfers. Whatever effect such representations might have had upon the contract of purchase, it is not necessary to notice. It is quite clear that they would not invalidate the title of Hatfield & Marshall.

It is probable that upon the former trial, there was evidence produced (not furnished on the second trial), which authorized the somewhat severe comments of one of the learned justices who sat upon the hearing of the first appeal (19 *Abb. Pr.*, 169), on the fraud in fact which he supposed was established against the defendants. Upon the last trial no evidence whatever was given of any fraud in fact; but the plaintiffs relied solely upon a fraud in law, which, they claim, appears upon the face of the papers. That question I have disposed of. But, I think, that learned justice misapprehended the nature of the transfer of the goods and merchandise to Hatfield & Marshall, as he assumed it was not a sale, but an assignment as *secur-*

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ity for their debt. The assignment was not given in evidence, and the plaintiffs offered no proof of its contents. Each of the defendants says, in his answer, it was a *sale*, intended to secure to Hatfield & Marshall an indebtedness of Addison Brothers to them. The distinction, therefore, between a sale to a creditor and a transfer as security merely, if it was of any importance, cannot be taken to the prejudice of Hatfield & Marshall in this case. But whether a sale or a transfer as security for existing indebtedness, the survivor had the power to convey the choses in action and property, and the title acquired by Hatfield & Marshall cannot, in the absence of *actual* fraud, be disturbed by creditors of Addison Brothers.

For these reasons I think the complaint was properly dismissed, and that the judgment should, therefore, be affirmed, with costs.

ROBERTSON, Ch. J.—This action could easily be disposed of, if it were simply a pursuit by the plaintiffs as judgment creditors of Samuel D. Addison as their sole debtor, of his separate property into the hands of fraudulent grantees of his.

The disposition of it would then turn entirely on the question of fraudulent intent, as matter of fact, in making the transfers assailed in this action, since there is no claim that they are void for fraud on their face. It has some of the features of such an action, because it is upon a judgment against Samuel D. Addison alone; and if the legal ownership of the partnership effects survived to him, so that he could dispose of them as he thought proper, unchecked by any trust or duty, towards either the estate or representatives of his deceased partner, or the creditors of the firm, they would be virtually his property, capable of being reached by his individual judgment creditors.

In such case, his settlement upon his wife, of property when largely indebted, and not having means, beyond what would enable him to pay his debts, sufficient to warrant the amount of such settled property, his subsequent carrying on business with money borrowed from his fa-

ther-in-law (Hatfield), and shifting his indebtedness from one creditor to another, his false representations to the plaintiffs of his ability to pay them, his subsequent transfer of most of his goods to his father-in-law, and in fact of all his available assets for the security of the latter, if proved to be the connecting links of one design, might be taken as evidence of an intent to defraud.

There are in this case some defects, however, in the evidence offered to prove some of those facts, and the connection of others, which interfere with such a conclusion: such as the lapse of time between the settlement on the wife, and the incurring of the debt to the plaintiffs: the want of proof of his inability to pay his debts at the date of the former, or of his indebtedness to others at the time of contracting his indebtedness to the plaintiffs. Nor was his special insolvency traced to such transfers; for which reasons probably the learned justice at special term found against any fraudulent intent, as matter of fact, in such conveyances; with which finding there is no good ground for any interference.

But the plaintiffs introduce into this action a new element, which they claim gives them more rights than if Samuel D. Addison had been their sole debtor, and the partnership assets absolutely his property. They allege their debt to be a partnership debt of his, jointly with Joseph Addison, and that the transfers of the partnership assets of the firm of Addison Brothers, to the defendants Hatfield and Marshall, by Samuel D. Addison, as surviving partner, were illegal, because he had no power so to transfer them, at least for the purposes for which they were transferred; and that, being unauthorized, such transfers were made thereby a *fraud* upon the estate, representatives, or creditors of Joseph Addison.

This action, however, is not merely an equitable one against the estate of Joseph Addison, as a deceased contractor, jointly with his brother, to enforce a claim which the plaintiffs have failed to collect at law against the surviving partner. If it had been intended as such, it would have been ineffectual, without the presence of some one to

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represent such estate. But overleaping any succession to Joseph Addison's estate, it seeks to reach that which is claimed to have been *his property* in the hands of his surviving partner. This cannot be done without having some one before the court entitled to represent his estate. Nor could the plaintiffs proceed to set aside transfers of Joseph Addison's interest as fraudulent, in any event, without having some representative of his estate as a party, and the occurrence of some delay or collusion on the part of such representative: and even then they could only have such interest administered as assets in the due course of administration to pay all his debts (*Bate v. Graham*, 11 *N. Y.*, 237). In that case, the plaintiffs have no preference, as they have no judgment against Joseph Addison. Even, therefore, if the ownership of neither the choses in action, nor the goods and chattels of the firm of Addison Brothers, survived to Samuel D. Addison on the death of Joseph, but the former took only an undivided moiety thereof, there is no one in the action against whom a judgment can be rendered as to the interest of Joseph. It is not a mere defect of parties, but a failure of title on the part of the plaintiffs, who can only claim through such administrator, as plaintiff or defendant.

As to the interest of Samuel D. Addison in the partnership assets, he clearly had a right to use that for any lawful purpose, and his attempt also to transfer his brother's interest, if he had any, does not affect the transfer of his own, any more than if it had been a stranger, who was tenant in common with him; and the plaintiffs cannot reach that interest unless the transfer of his remaining interest in the goods, and the Pacific Bank securities, was void for fraud.

I do not perceive, therefore, that it becomes important in this case, whether the ownership of the partnership assets of Addison Brothers survived to Samuel D. Addison, or he became entitled to only a moiety thereof. In neither case were the plaintiffs entitled to any relief in this action, unless by proof of fraud other than the mere attempt to transfer the whole of such assets to the defendants Hat-

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field and Marshall. There is no evidence before us assailing the validity of the debt to them, or of the assignment of goods to them in payment of part. The surviving partner had a right to have secured their claim by a mortgage or pledge of all the goods, until the plaintiffs acquired some right to interfere by a lien at law or in equity. No more injury was done to the plaintiffs by the course pursued, than would have been by such mortgage. Samuel D. Addison conveyed certain goods in satisfaction of an equal amount of debt. If the consideration for the release failed by the failure of their title, of course the debt revived, or some equivalent liability was incurred, which he had a right to secure by mortgage of the Pacific Bank securities.

I, therefore, concur, in thinking that the judgment should be affirmed with costs.

BARBOUR, J., concurred in the opinion of MONELL, J.

Judgment affirmed.

*Distinguished,
22 Jan 1877-1880*

DILLINGHAM *against* BOLT.

Court of Appeals, September, 1867.

CHATTEL MORTGAGE.—REFILING.

One who purchases property covered by a chattel mortgage, from a purchaser from the mortgagor, is a "subsequent purchaser," within the meaning of *Laws of 1833, 402, § 3*,—providing that a chattel mortgage shall cease to be valid as against subsequent purchasers, &c., after the expiration of one year from the filing thereof, unless refiled,—notwithstanding his purchase was not directly from the mortgagor; and a refileing, &c. is necessary to prevent his purchase from overreaching the mortgage.

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Where the mortgagor in a chattel mortgage removes from the State, the mortgagee must, as against creditors, subsequent purchasers, &c., take advantage of his mortgage within the year, or lose the benefit of it. Refiling the mortgage in the town in which the mortgagor formerly resided, is of no avail.

Appeal from a judgment of the supreme court.

The action was brought by George A. Dillingham against Carlos A. Bolt and Samuel Sadue. The facts out of which it arose are stated in the opinion.

BY THE COURT.—PARKER, J.—This action was brought to recover possession of a canal-boat. The defendants, in their answer, justified the taking and detention complained of, under a chattel mortgage executed by a former owner of the boat to defendant Sadue.

The cause was referred, and the trial before the referee resulted in a judgment for the plaintiff, which judgment was reversed by the court, at general term, and a new trial ordered.

The referee found, as facts, that on July 27, 1855, one James Thistle, then a resident of the town of Sweden, in the county of Monroe, owned the boat in question, and, being indebted to the defendant Sadue in the sum of \$70.97, he on that day executed to him the mortgage set forth in the answer, which was filed in the office of the town clerk of said town of Sweden, on July 28, 1855. That in October, 1855, Parmelee, Everts & Co., for a valuable consideration, without knowledge of the mortgage, and in good faith, bought the boat of Thistle, he having continued and then being in possession thereof. That Parmelee took possession of the boat, and continued in possession until August, 1856, when the plaintiff purchased it of him in good faith, for a valuable consideration, and without knowledge of said mortgage, took it into possession, and continued to hold it until September 2, 1856, when, the amount secured by the mortgage being past due and unpaid, the defendants took the boat from the plaintiff by virtue of said mortgage, the defendant

Bolt acting under the direction and as the agent of the defendant Sadue. That on July 27, 1856, a copy of the mortgage, with the following statement thereon, was filed, in the office of the town clerk of the said town of Sweden, to wit: "The said mortgage, of which the within is a copy, is unpaid, and there remains due thereon the sum of somewhere about sixty dollars, as near as the same can be estimated, and the mortgagee claims an interest therein to that amount or thereabouts. That he has a good, valid, and subsisting lien on the property therein until the same is canceled."

His conclusions of law were, that the mortgage was good in its inception; that the statement exhibiting the interest of the mortgagee was sufficient in point of form; that the plaintiff was a subsequent purchaser in good faith, and that the mortgage ceased to be valid as against him, after the expiration of one year from the original filing thereof, for the reason that the copy and statement were not filed in the office of the clerk of the town where the mortgagee *resided at the time of such filing*. Hence judgment was ordered for the plaintiff.

As against Parmelee, Everts & Co., who purchased before the expiration of the year from the first filing of the mortgage, no refileing with a statement was necessary. It was held in *Meech v. Patchin* (14 N. Y., 71), that the omission to refile a chattel mortgage, pursuant to section 3 of the act on that subject (*Laws of 1833*, 403), does not render it invalid against purchasers or mortgagees intermediate the original filing and the ending of the year; and that the term "*subsequent*," in the provision in that section, that "every mortgage filed in pursuance of this act shall cease to be valid as against the creditors of the person making the same, or against *subsequent* purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof; unless," &c., means subsequent to the expiration of the year—that is, after the time of refileing has elapsed. Had these purchasers, therefore, who purchased before the expiration of the year, continued to be owners until September 2, 1856, when de-

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fendant Sadue took the property under his mortgage, there could be no pretense, inasmuch as they were not subsequent purchasers, that they could have held it against the mortgage, even if there had been no attempt to file the copy of the statement.

The plaintiff purchased of them after the year. Is he, within the meaning of the act, a subsequent purchaser?

The general term held he was not, but stood in the shoes of Parmelee, taking no better right than he had; and therefore decided that the defendants, under the mortgage, had the better claim, and reversed the judgment. In this view of the case, I cannot but think the general term erred. It seems very clear to me that the plaintiff is a subsequent purchaser, within the meaning of the act.

The statute does not expressly limit the term "purchaser" to the purchaser directly from the mortgagor, nor do I think there is any such limitation implied or intended. The object of the original filing of the mortgage is to give public notice of the lien, thereby affixing to the property mortgaged, as it were, an ear mark, indicating to all persons who would purchase it the existence of the lien; and this, not only while remaining in the hands of the mortgagor, but in whose hands soever it may be. The effect of this notice attends the property as it passes from hand to hand during the year, so that no purchaser, however remote from the mortgagor, can hold it as against the mortgage. As the filing of the mortgage is to avail the mortgagee as notice of the lien, not merely to the immediate purchaser from the mortgagor, but to all subsequent vendors, so the requirement to file it and then give the notice, was in order to protect purchasers, not from the imposition of the mortgagor alone, but against that of all the successive purchasers from him down to the end of the year. As the notice is for the benefit of all purchasers during the year, all are entitled to it, and all may take advantage of its omission.

The same is true of the refiling and statement required by the third section of the act. The object of that

is merely to extend and continue in operation the effect of the first filing as to the amount remaining unpaid, for another year.

I can see no reason, therefore, why the plaintiff, although his purchase was not directly from the mortgagor, but from his vendor, is not to be deemed a *subsequent* purchaser, within the meaning and intent of the act, as well as within its terms. If he was, then the refiling and statement required by the third section was necessary to prevent his *bona fide* purchase from overreaching the mortgage and giving him a title unincumbered by it.

It is said, however, by the respondent's counsel, that a person cannot convey a better title than he has, and therefore the plaintiff acquired by his purchase from Parmelee no better title than Parmelee had, which was a title subject to the lien of the mortgage.

The principle evolved by the counsel can have no application, I apprehend, to cases under the registry law. The mortgagor, Thistle, for example, subsequent to the giving of the mortgage, had no legal title to the canal-boat; and yet if he, remaining in this State, had retained it until after the expiration of the year, and then sold it to the plaintiff, in the absence of the refiling no one would doubt that plaintiff would have held it free from the lien of the mortgage, notwithstanding Thistle's right was subject to the mortgage.

But for the fact, then, that Thistle had left the State, and during the thirty days next preceding the close of the year did not reside in it, I should be very clearly of the opinion that the judgment of the general term ought to be reversed. The question arises, however, whether such removal and non-residence did not render the refiling unnecessary. Although, at first view, it would seem that the requirement of the statute, making a refiling necessary within thirty days before the expiration of the year, cannot apply to cases where the mortgagee is not during the thirty days, a resident of the State, because the filing is specifically required to be in the office of the clerk of the town "where the mortgagee *shall then* reside,"

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which requirement is nugatory, if the mortgagor does not then reside in the State; still, in view of the specific provision of the same section, that "every mortgage filed in pursuance of this act *shall cease to be valid*, as against subsequent purchasers in good faith, after the expiration of a year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement," &c., "shall be again filed in the office of the clerk of the town where the mortgagor shall then reside," we think it must be held that, when the contingency occurs which has happened in this case, the mortgagee must, as against the creditors and purchasers mentioned in the section, take advantage of his mortgage within the year, or lose the benefit of it as against them. The declaration that it shall cease to be valid unless refiled was, we think, intended to operate as well when the refiling was rendered impossible by the removal of the mortgagor, as when it was omitted for any other reason.

The refiling made in the case before us, in the town where the mortgagor had formerly resided, was of no avail, and it is unnecessary to examine the question whether the statement was such as the statute requires. It follows that the lien of the mortgage had ceased as against the plaintiff, and the referee was right in ordering judgment in his favor. The judgment of the general term, reversing that judgment, was therefore erroneous, and must be reversed.

All the judges concurred.

Judgment reversed.

Reversed,
50 Barb. 147.

NORTHROP *against* THE PEOPLE.*Court of Appeals; September, 1867.*

COURTS.—PLACE OF HOLDING.—ADJOURNMENT.

Under the provisions of the code of procedure, directing the judges of the supreme court in each district to appoint times and places of holding courts in their respective districts, it is not competent to a single judge, holding a court of oyer and terminer, to adjourn such court to a place which has not been designated by the judges acting together, as a place for holding it. The manner in which the place for holding a court in certain cases, is fixed.

Error to review a judgment of conviction on an indictment.

The plaintiff in error was indicted by a grand jury of the county of Westchester, in September, 1866, for administering poison to his wife.

In December following, a court of oyer and terminer convened at the court-house in White Plains, in said county, and it was ordered, and proclamation made, that the same be adjourned to the 14th day of January, 1867, at the court-house in Bedford in that county.

At the adjourned day, at Bedford, only ten petit jurors answered, and the court directed that seventy-five talesmen be summoned by the sheriff for the following morning, till which time the court adjourned.

These talesmen were accordingly summoned from the town of Bedford, and some of them sat upon the trial of the indictment.

Before the jury were called, certain objections were made by the counsel for the prisoner to the legality of the court as thus sitting, and to the jury as thus constituted. The district-attorney having moved the indictment

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for trial, the defendant's counsel showed that in the appointment by the justices of the second judicial district of terms for the holding of courts, no appointment for the holding of any court of oyer and terminer to be held at Bedford, for the county of Westchester, had been made for either of the years of 1866 or 1867, and it was therefore contended that the court then and there sitting had no rightful power or authority to proceed with the trial. This objection was overruled, and exception taken.

Another objection was, that only ten petit jurors of those summoned having appeared, "the court then ordered the clerk to prepare ballots of the jurors in said town of Bedford, and ordered the sheriff to proceed and draw the names of seventy-five jurors from the box containing the names of said jurors in said town of Bedford to act as talesmen." This objection was placed on the ground that the order should have been to summon enough jurors from the county at large, or from the bystanders, to make the whole number at least twenty-four, from which to draw a jury. This objection was also overruled, and the decision duly excepted to.

The prisoner having been convicted, a writ of error was sued out.

Robert Cochran, for the plaintiff in error.

John S. Bates, district-attorney, and *Chauncey Shaffer*, for the people.

FULLERTON, J.—By the laws of 1813 (2 *Laws of 1813*, 142, § 4), White Plains and Bedford were fixed as the places where the courts of common pleas should be held in the county of Westchester, and the circuit courts and courts of oyer and terminer were required, by a subsequent statute, to be held at the same places.

Section 17 of the code repeals the statute last referred to, and substitutes another mode of appointment. By section 22 the judges of the supreme court of each district are required to appoint the times and places for holding courts within their respective districts. Section 24 pro-

vided, however, that the *places* appointed within the several counties for holding said courts, should be those designated by statute for holding county or circuit courts. By the same statute (§ 25) it is made necessary that these appointments thus made should be transmitted to the secretary of state, and, when received by that officer, it became his duty to cause the same to be published in the State paper, at least once a week for three successive weeks before the holding of any courts in pursuance thereof.

Under this authority, the justices of the supreme court of the second district, in November, 1865, at a meeting for that purpose, designated and appointed White Plains as the place for holding the circuit courts and courts of oyer and terminer for Westchester county, for the years 1866 and 1867, but omitted so to designate Bedford. It is not so stated in the case, but it is to be presumed that these appointments were duly transmitted to the secretary of state, and published by him in pursuance of the foregoing statute.

In pursuance of this appointment, a court of oyer and terminer convened at White Plains in December, 1866, and for some reason not disclosed in the case, was adjourned to the 14th day of January then next following, at the courthouse in Bedford. At such adjourned term the plaintiff in error was tried and convicted of administering poison to his wife, with intent to kill ; and at a subsequent term was sentenced to the State prison for twelve years.

Before the trial the prisoner's counsel objected to proceeding therewith, on the ground that the adjournment from White Plains to Bedford was unauthorized ; and this presents the only important question in this case.

The power to fix the times and places of holding courts was committed by statute to *all* the judges, and not to a *single* judge of a judicial district. In virtue of this power, White Plains was the only place appointed for holding the courts of oyer and terminer, for the year 1867, in the county of Westchester. It was not in the power of a single judge, at any time, and certainly not after all the

judges had united in making the appointments, to appoint any other place for holding courts in that county. By statute, whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, or authority, or duty, may be exercised or performed by a majority of such persons or officers so intrusted or empowered (3 *Rev. Stat.*, 5th ed., 869, § 29).

I cannot see why this provision does not apply to this case. It was designed to prevent the exercise of a power delegated to a number of persons by less than a majority of that number. This design is frustrated, if a single judge is permitted to adjourn a court to a place purposely omitted to be designated by all the judges, when they assembled and made the appointments as required by law. The policy of the law is to inspire confidence in the administration of justice. It is the right of every citizen to know the times and places for holding the courts where his liberty or property may be put in jeopardy, and that would be a lax system of legislation, indeed, which would leave them the subjects of sudden and perhaps capricious changes. Our legislature has not so left them. They have solemnly determined that all the judges of each district shall unite in designating the places of holding courts, and require that the appointments thus made shall be published in the State paper for three weeks before any court shall be held in pursuance of them.

To sanction the court at which the prisoner was convicted is to annul entirely all these provisions. I have not failed to consider the argument that Bedford was one of the places which *might* have been designated for holding the courts in Westchester county. But the answer to this proposition is, that it was not designated and published as the statute requires, and for that reason was not a place for holding a court.

The power of a court to adjourn to another *place*, as well as *time*, is not necessarily involved in this case ; but if even that should be conceded, it would still be necessary to adjourn to a place where it would have originally

been proper to hold a court. When the places for holding the courts were incorporated in the statute itself, it would not have been pretended that a judge could hold a court at any other place, under any circumstances, without legislative authority. During the prevalence of "war, pestilence, or other public calamity, or the danger thereof," courts may be held at places different from those appointed by statute (3 *Rev. Stat.*, 5th ed., § 75, p. 480).

In such cases, however, the change is to be made "in writing, under the hand of the governor," and recorded in the office of the secretary of state, and published in as many public papers as the governor shall designate (§ 76). This shows that the legislature considered the appointment of the places where courts should be held as a matter of importance, and they did not intend that they should be changed for slight causes, and not at all unless such change was duly published. (See also §§ 15 and 16 of the *Code* respecting adjournments of the court of appeals.)

I can see no difference between the force of an appointment directly by statute, and one made by judges to whom the legislature has delegated its power to make it, especially where, after it is made, it is required to be lodged in the archives of the State, and published in the State paper. Such an appointment ought to be as immutable as if made by the legislature itself.

Even if the power of determining where the courts should be held had been conferred upon a single judge, the action of the court, in this instance, could not be sustained. The adjournment of the oyer and terminer to Bedford was not, *ipso facto*, an appointment of that place for holding the court, within the meaning of the statute. It still would be necessary to transmit the appointment to the state department, and have the same published according to law. These provisions of the statute cannot all be regarded as merely directory.

In the case of *The People v. Moneghan* (1 *Park. Cr.*, 570), it was held that courts of sessions could not be held, except in pursuance of a previous order of a county

judge, made under the authority of the Laws of 1851, ch. 444, designating the *times* when such courts should be held, and published as therein directed.

The question arose as follows :

By the act referred to, it was provided that " courts of sessions, except in the city and county of New York, shall be held in the respective counties at such *times* as the county judge of the county shall *by order designate* . . . such order shall be published in a newspaper printed in such county for four successive weeks previous to the time of holding the first term of said court under such order."

The county judge of Livingston county, under this authority, attempted to appoint the *times* for holding the court of sessions in that county, but erroneously made the order to apply only to the *county* courts.

A court of sessions was held on one of the days thus appointed, at which a person was indicted and convicted of felony. The proceedings were removed into the supreme court, where the indictment was quashed, on the ground that no valid appointment for holding the court had been made.

The places at which courts are held derive an additional importance from the terms of the statute relating to trials by jury. Chapter 210 of the Laws of 1861 provides, that in addition to the box, by law now provided and kept for drawing jurors, the clerk of every county shall provide another box, in which he shall deposit the names of all persons who have been selected and returned as suitable persons to serve as jurors, and who reside *in the city or town where courts are appointed by law to be held* ; and that whenever the regular panel is insufficient, the sheriff shall draw from the box so provided the names of as many persons as shall supply any deficiency. In this case the regular panel was exhausted, and the remaining jurors were drawn from the box provided for by the law just quoted, and consequently *were taken from the town of Bedford*. To this the prisoner's counsel objected. It follows, of course, that if the court was improperly ad-

journed to Bedford, the prisoner was not properly tried before the jury there impaneled, and has therefore lost the benefit of a substantial statutory right.

The cases cited (8 *Cow.*, 286 ; 1 *Seld.*, 22), to show the extent of the power of adjournment by bodies invested with it, are not applicable to this case, for many reasons. These are cases where the qualified electors of a town, at their annual town meeting, after having duly organized, adjourned to another place to consummate the business before them. This was held to be proper, in the exercise of a power conferred upon them by the statute, to hold their meetings at such places as they should from time to time appoint. Here is no limitation as to place ; and though the electors met at a place appointed the year previous, yet having so met and duly organized, they were, *ex vi termini*, clothed with their original power of adjournment, and could then exercise it without rendering their proceedings invalid.

No one can doubt for a moment that the learned judge who adjourned the court to Bedford was prompted by the purest motives ; but this cannot enter into the consideration of this court in determining as to the legality of the act.

The judgment appealed from must therefore be reversed, and a new trial ordered.

Judgment reversed.

WELLS *against* KELSEY.*Court of Appeals ; September, 1867.*

EVIDENCE.—TESTIMONY TO VALUE.

In an action for conversion of chattels, the plaintiff having testified in his own behalf to his opinion of the value of the chattels,—*Held*, that it was competent on cross-examination to ask him what he paid for them. His answer might be regarded by the jury in determining what weight to assign to his estimate of value; even although it appeared that he purchased them in mass with other articles.

In the case of a witness who has given an opinion as to value, it is peculiarly proper, upon cross-examination, to test his means of knowledge, to scrutinize the grounds of his judgment, and to elicit such specific facts as may aid in applying and weighing his testimony.

Appeal from a judgment of the supreme court in the second district.

The action was brought to recover damages for the conversion by the defendant of two boilers and a quantity of brick, with some other articles of minor value. These had been put in a building on defendant's premises, in the summer of 1858, by his tenants, Durkee & Case, to be used by them in their business, which was the manufacture of soda, saleratus, and drugs. The building was destroyed by fire on August 30, 1860, which terminated the demise, under a provision embodied in the lease. The question then arose whether the articles thus introduced by the tenants belonged to the plaintiff, to whom they sold them after the fire, or to the defendant, who claimed them, in whole or in part, as fixtures annexed to his freehold.

On the trial at the Kings circuit, clear proof was made of the plaintiff's title; and the principal issues came to be as to the fact of conversion by the defendant, and as to the

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actual value of the property. On both these questions there was a conflict of evidence ; and the jury found adversely to the defendant.

The plaintiff having obtained judgment on the verdict, the defendant appealed to the general term, when the judgment was affirmed. The proceedings on that hearing are reported (38 *Barb.*, 242 ; and 15 *Abb. Pr.*, 53). The defendant now appealed from the judgment of affirmance.

The questions raised upon the present appeal related to rulings of the court on the trial excluding questions put by the defendant concerning the value of the property.

Upon the trial the plaintiff was sworn as a witness in his own behalf, and testified, among other things, that he bought the property in question on October 1, 1860 ; that, in his own opinion, the two boilers, at the time of the alleged conversion, were worth as much as if they were new, and were of the value of \$800 ; that the boiler-front was worth at least \$50 more ; that the boiler-bolts were worth at least \$40, and the brick at least \$155 ; thus making an aggregate of \$1,045, as the value of the property converted.

To weaken the force of this evidence, the defendant, on his cross-examination, called for the production of his bill of sale. This evidence was excluded, and the defendant excepted.

It afterwards appeared, by the testimony of Durkee & Case, that they had been some weeks endeavoring to sell the property, before they effected a sale to the plaintiff ; that the boilers had been two years in use by them before the fire ; that the part of the building in which they were was not much injured by the fire, but was afterwards unoccupied ; that the boilers were second-hand when they bought them, and that they were lying on a vacant lot at the time of the original purchase.

The defendant, on the cross-examination of Durkee, interrogated him as to the price they paid for the boilers. The evidence was excluded, and the defendant excepted.

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He then introduced the testimony of several boiler manufacturers, tending to show that the boilers, when new, were not worth (to exceed) \$550, and that in their condition at the time of the alleged conversion, they were worth only from \$160 to \$350.

Britton & Ely, for the appellant.

A. N. Weller, for the respondent.

PORTER, J.—The principal issue on the trial was as to the value of a pair of boilers, at the time of their conversion by the defendant; which was three days after they were sold to the plaintiff. They were second-hand boilers two years before, when they were bought by Durkee & Case, and they had been exposed to injury from disuse as well as from use.

The plaintiff testified, as a witness in his own behalf, that their value was \$800, and that they were worth as much as if they were new. This was competent evidence of value, but it was inconclusive in its nature. It was an estimate resting upon the opinion of a party subject to bias; and it related to second-hand articles, having no certain and definite market value. The statement carried with it no absolute assurance of verity; and even if he made it in perfect good faith, the accuracy of his judgment might be open to question, in view of facts unknown to the jury, but within his personal cognisance. It was the right of cross-examining counsel to elicit these, if they were inharmonious with his evidence. They were at liberty to show that he bought the boilers three days before, on credit, at a fair and open sale, from parties who had used them, and knew their value, for half the sum at which he now assessed them. This seems to be conceded in the opinion delivered in the court below; but it was held that a different rule prevailed where, as in this case, the injury involved the value of other articles included in the same sale. We do not think such a distinction well founded, nor do we find it recognized in the authorities. The objection, if it has any force, goes to the facility of

proving the fact, and not to its admissibility as legal evidence.

The particular form of the transaction made it necessary to ascertain the relative value of the articles included in the bill of sale. If the plaintiff had testified, in answer to the inquiry, that the other articles embraced in the \$1,200 purchase were worth twice as much as the boilers, it would be a reasonable inference that his present valuation of the latter considerably exceeded their cost. It is true that the price which he paid for them would be indecisive as to their actual value; but it might well have a material bearing on the degree of weight to which his estimate of that value was entitled.

But even if this inquiry was properly disallowed, the court erred in excluding proof of the price paid specifically for the boilers, on their purchase by the vendors of the plaintiff. It is assumed, in the opinion delivered at the general term, that if evidence of this kind had been offered, it would have been admissible within the rule, and the fact, disclosed in the printed case, that such proof was tendered and rejected on the trial, seems to have been overlooked. The authorities on this subject are decisive and uniform, and we think the rule they establish is sound in principle (*Campbell v. Woodworth*, 20 *N. Y.*, 499; *Dixon v. Buck*, 42 *Barb.*, 70; *Crounse v. Fitch*, 23 *How. Pr.*, 350; *Suydam v. Jenkins*, 4 *Sandf.*, 628).

While the law admits the opinions of those competent to judge the application in this, as in other cases, of the usual tests of truth, on the cross-examination of the witness it is legitimate to ascertain his means of knowledge, to scrutinize the grounds of his judgment, and to elicit such specific facts as may aid in applying and weighing the evidence. Such facts are often at variance with the opinions expressed by the witness, which, from the nature of the case, are usually founded on data unknown to the court. On questions of value there is generally room for wide diversity of judgment; and when estimates are loosely made, they should be subject to all reasonable scrutiny. In this instance the inquiries were within the

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range of fair and legitimate cross-examination, and we think they should have been allowed by the court. A knowledge of the prices actually paid for the boilers, on two business sales, both *ante litem motam*, might well aid the jury in weighing the conflicting estimates, and in reaching an intelligent and just conclusion.

The judgment should be reversed, and a new trial should be ordered.

All the judges concurred, except HUNT and GROVER, J. J., who took no part.

Judgment reversed, and a new trial ordered.

SOWARBY *against* RUSSELL.

New York Superior Court; General Term, May, 1868.

FORECLOSURE OF MORTGAGE.—BURDEN OF PROOF UNDER THIRTY DAYS' CLAUSE.

On trial of an action to foreclose a mortgage, brought under a clause providing that when interest has remained in arrear for thirty days, the whole principal sum shall, at the option of the mortgagee, &c., become due and payable, the mere production of the bond and mortgage is sufficient,—the thirty days appearing to have elapsed since a day named in the mortgage for a payment of interest,—to entitle the plaintiff to a decree.

It is not necessary for the plaintiff to prove that the interest has not been paid.

Appeal from a judgment of foreclosure.

This action was brought in October, 1867, to foreclose a mortgage for \$800, falling due March 9, 1869.

The mortgage, however, contained a provision in the following terms:

“And it is hereby expressly agreed that, should any

default be made in the payment of the said interest, or of any part thereof, on any day whenever the same is made payable as above expressed, and should the same remain unpaid and in arrear for the space of thirty days, then and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid principal sum of \$800, with all arrearages of interest thereon, shall, at the option of the party of the second part, his administrators or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired," &c.

The complaint alleged that the mortgagor had failed to comply with the condition, "by omitting to pay any interest thereon, and that more than thirty days have elapsed since the interest became due ; by reason whereof, the whole principal sum, with the arrearages of interest, have become due and payable."

The answer substantially denied that the interest was due or unpaid.

Upon the trial, which took place before Chief Justice ROBERTSON, at special term, the plaintiff offered and read in evidence the bond and mortgage, and rested.

The defendant then moved to dismiss the complaint, and for judgment in favor of the defendant, upon the ground that the plaintiff had made no proof of default in payment of interest, rendering the mortgage due.

The court denied the motion, and rendered judgment for the plaintiff ; from which the defendant appealed.

W. J. Foster and *Elbridge T. Gerry*, for the appellant.—I. There was no evidence of any default in the payment of interest. 1. All the evidence offered by the plaintiff was the bond, mortgage and assignment to him. There was no legal presumption of default in payment of interest, from the mere fact that these instruments were in the possession of the plaintiff. The principal of the bond not falling due until 1869, the plaintiff would still retain possession of it to that time, even if the interest was paid regularly, and the presumption is that it was paid regu-

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larly (*Ferguson v. Ferguson* (2 *Comst.*) 2 *N. Y.*, 364). The case thus differs from that of an action brought on a note or other security *past due*, where possession of the security is presumptive evidence of its non-payment (*Story Prom. Notes*, § 381). 2. "The production of the bond and mortgage was not evidence of the amount which he was entitled to receive by reason of the specific character belonging to them. Nor is his own assertion in the bill, contradicted as it is by the answer, such evidence. The burden was on the complainant to prove the amount due (*De Mott v. Benson*, 4 *Edw. Ch.*, 306).

II. The *onus* of proving such default was on the plaintiff. His omission to prove it was fatal to his right to recover. 1. This alleged default was the *gravamen* of the suit, and the only ground on which he claimed a decree in his favor. But for such default he could not have filed his bill to foreclose until the principal sum fell due in 1869. 2. The allegation of fact (*scil.* the default) was traversed by the appellant's answer. A direct issue was thus raised on the fact. 3. Now the rule of law is, that a traverse of our allegation of fact throws the burden of proof on the other party; and where the non-performance of an act is relied on and pleaded as the *gist* of an action, if traversed, the plaintiff must prove it as alleged. In such case the assertion that a party has *not* performed, &c., is *affirmative* in fact, even though it be negative in *form* (*Roscoe's Ev. at N. P.*, 90; *Best on Ev.*, 408, 413; *Powell on Ev.*, 183). It is uniformly so held where the non-performance of a condition works a forfeiture, and an action is brought to obtain judgment of forfeiture (*Doe v. Whitehead*, 8 *Ad. & El.*, 571; *Doe v. Robson*, 2 *Carr. & P.*, 245; *Gregory v. Tuffs*, 6 *Id.*, 271; *Calder v. Rutherford*, 3 *Brod. & B.*, 302). So, in an action by a shipowner for loading with combustibles without due notice, the plaintiff was required to prove absence of notice (*Williams v. East India Co.*, 3 *East*, 193). And in a recent Illinois case, which was an action of ejectment where the plaintiff sought to recover on the ground that the defendant had not performed his covenants in neglecting to pay

the notes given for the purchase of the land in controversy, the court held that the burden of proof was on the plaintiff to show such default (*Roland v. Fischer*, 30 *Ill.*, 224). 4. Indeed, "the best tests that can be devised for ascertaining on whom the burden of proof lies, are, first, to consider which party would succeed if no evidence were given on either side; and secondly, to examine what would be the effect of striking out of the record the allegation to be proved; bearing in mind that the *onus* must lie on whichever party would fail if either of these steps were pursued" (1 *Tayl. Ev.*, § 269, and numerous cases there cited; *Mills v. Barber*, 1 *Mees. & W.*, 425; *Soward v. Leggatt*, 7 *Carr. & P.*, 613; *S. C.*, *Beston Ev.*, 361-3; *Belcher v. McIntosh*, 8 *Carr. & P.*, 720). 5. Proof of the default alleged was also essential as a foundation on which to compute the interest. No definite amount was demanded in the summons, and without computation no definite judgment could be rendered (*Security Fire Ins. Co. v. Martin*, 15 *Abb. Pr.*, 479). Besides, the appellant was not the obligor, nor chargeable personally with payment of the interest on the bond. Hence the fact of any default in its payment was more peculiarly within the knowledge of the parties to the bond. It could easily have been proved by the mortgagee, who was called, but withdrawn.

III. There was no proof of any demand of the interest alleged to be due prior to the commencement of this suit. This was necessary; and to this omission there was a special exception. 1. If, by the terms of the interest condition or thirty days' clause in the mortgage, the principal sum became absolutely due upon a default in the payment of interest, there would be ground to contend that the case was analogous to those of notes payable on demand, &c., &c., in which it has been held that the commencement of a suit is a sufficient demand. 2. But in the present case, the principal debt does not become absolutely payable on such default, but only becomes so at the option of the mortgagee (or his representative). The latter, in other words, may hold the mortgage as an in-

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vestment, or require its payment, as he pleases. Until the mortgagor be informed of such decision, no duty is incumbent on him to make payment. 3. Besides, by death, assignment, or the like, this option may have been transferred (as it was in this case) from the original mortgagee to a representative. The mortgagor is entitled to notice in whom the option is vested, at the time when it is exercised. 4. This suit being in equity, nothing is allowable against a mortgagor which is inequitable. To allow the commencement of a suit to be treated as an exercise of the option, is inequitable, in that it enables the mortgagee to charge the mortgagor with costs for the exercise by the power of his option. 5. This is not an action for the debt, but a suit in equity to enforce a collateral security. A suit *on the bond* might be equivalent to a demand of the debt represented by it, on the principle above stated, but not a suit in equity like the present.

William Tracy, for the respondent;—contended that the plaintiff having proved the bond and mortgage, which showed the indebtedness as alleged, it was for the defendant to give any proof she might have to prevent a recovery. She gave none, and the plaintiff was entitled to the judgment ordered (*People v. Superior Court*, 19 *Wend.*, 104; *Noyes v. Clark*, 7 *Paige*, 179).

BY THE COURT.*—MONELL, J.—The only question in this case is, whether the mere production of the bond and mortgage was sufficient evidence of default in the payment of interest to authorize a judgment declaring the whole principal sum secured by the mortgage to be due and immediately payable.

It was conceded that ordinarily no other or further proof would be necessary; but it was attempted to distinguish this case; and it was insisted that where a mortgagee designs to avail himself of a breach of a covenant, and to claim the whole principal to be due by reason of the non-payment of interest, he must show default by

Present, MONELL, GARVIN and JONES, JJ.

other proof. In other words, that he must prove that the interest has not been paid.

It is a general principle that written instruments for the payment of money require no proof of default, and the burden of showing there has been no default rests upon the party charged with the default. In actions, therefore, for the recovery of money alleged to be due upon a written instrument, the production of the instrument and giving it in evidence is all the proof required, and the affirmative of showing there is nothing due lies upon the defendant.

I am unable to distinguish the case before me from the ordinary case. The proof required in any case is, that default has been made in the payment of interest. All that need be proved in any case, is, such default; and so far as regards the proof, the consequences of the default are quite immaterial. Therefore, if the production of a bond and mortgage is sufficient proof, in a common case, that the interest is unpaid, and will authorize a judgment for such interest, then the same proof will be sufficient as the foundation for any further judgment appropriate to the case. If it appears from the bond that the pay day has passed, this is presumptive evidence that the interest is due and unpaid. Anything tending to discharge the obligation must be averred by the defendant, who necessarily holds the affirmative of the issue. *Ei incumbit probatio qui dicit, non qui negat.*

The covenant in the mortgage is, that if any default be made in the payment of interest, and such default continue for thirty days, the mortgagee may elect to have the whole principal become due. I do not see that any other proof than such as was offered in this case could have been required. A mortgagee, to avail himself of a breach of a covenant, cannot be required to prove a negative.

I think the judgment should be affirmed, with costs.

Judgment affirmed.

BUSWELL *against* POINEER.*Court of Appeals; September, 1867.*

PAROL EVIDENCE.—EXPLAINING RECEIPT.

Where the defendant in an action for goods sold, admits the sale and delivery alleged, but sets up payment made by transferring promissory notes accepted in satisfaction, the burden of proving payment in the manner alleged is upon the defendant.

A receipt attached to a bill of parcels of goods sold, acknowledging that the seller has "received payment by note," may be contradicted by parol evidence showing that the note was not accepted in satisfaction of the demand for the price.

Appeal from a judgment.

This action was brought by William Buswell against Horace J. Poiner, to recover the price of lumber sold to defendant under circumstances which are stated in the opinion.

S. Hand, for the appellant.

W. A. Beach, for the respondent.

DAVIES, Ch. J.—The plaintiff, as the assignee of Buswell & Son, lumber merchants of Troy, has brought this action to recover the amount of four several bills of lumber sold to the defendant, a resident of Newark, New Jersey, in the summer of 1856. The answer of the defendant admitted the sale and delivery of the lumber to him, as stated in the complaint, but set up as a defense that the defendant paid the said firm of Buswell & Son in full for each of said claims; that such payment was made by and with several promissory notes of the firm of Mann, Kendrick & Co.; and by them accepted in full payment and satisfaction of each of said claims, and of every part there-

of. The only issue, therefore, formed by the pleadings was the fact of such payment in the manner set up in the answer.

The affirmative of this issue was upon the defendant. He admitted the purchase by, and sale and delivery to him of the property of the plaintiff's assignor, and he sought to discharge himself of his liabilities to pay for the same by setting up payment. To maintain his defense he put in proof four several receipts of the plaintiff's assignor, attached to the four bills of parcels, three of which were in the words: "Received payment, by note, 3 months," and the last, "Received payment of M. K. & Co.'s note, 4 months." It appeared in proof that the notes so given were of the firm of Mann, Kendrick & Co. One of the firm of Mann, Kendrick & Co., which firm was located at and transacted business in Troy, testified on the trial "that the defendant usually came to Troy and selected such lumber as he wanted; the bills were sent to us, we gave our notes, and charged the lumber to him; usually, the next time he came up he gave us his notes."

The plaintiff gave parol evidence to contradict that part of the receipt given by Buswell & Son which states that the notes of Mann, Kendrick & Co. were received by Buswell & Son as payments. The defendant's counsel objected to such evidence, and the court overruled the objections, and the defendant's counsel excepted.

The court charged the jury that the receipts might be explained by parol testimony, and to this part of the charge the defendant's counsel also excepted. The defendant also excepted to that part of the charge which held and decided, that if the defendant offered paper which he knew, or had good reason to believe, was not good, and that Buswell & Son did not know it, and they agreed to take it in absolute payment, their agreement would be avoided by the fraud, and the defendant would remain liable.

The jury found a verdict for the plaintiff, and judgment thereon was reversed at the general term, and a new trial ordered.

The first question presented for consideration is, whether the rulings of the judge, in admitting parol evidence to explain the receipts, were correct. We think the authorities in this State, and the decision of this court, leaves no room for further question on this point. Without recurring to all the cases in the books on this subject, it will only be needful to call attention to a few of the most leading.

In *Tobey v. Barber* (5 *Johns.*, 68), a receipt had been given and indorsed on the counterpart of a lease for \$163, "and in full for the second and third quarters' rent." The plaintiff offered to prove that the defendant had procured one Coffin to give a note, payable to the plaintiff, or order, for \$115.63, at the bank of Columbia, in four months, and dated the same day as the receipt, and that it formed a part of the receipts; that Coffin failed before it became due, and took the benefit of the insolvent act; and that the note had not been paid. This evidence was objected to, and admitted. The judge charged the jury that a receipt was not conclusive evidence, but might be explained by parol. The court held that a receipt is an exception to the general rule, that a writing cannot be explained or contradicted by parol, citing *Ensign v. Webster* (1 *Johns. Cas.*, 145), and that the parol evidence was admissible. The court say: "The parol evidence was, then, admissible in this case, that the receipt of the 24th of September, 1803, though purporting to be in full for two quarters' rent, was founded partly on a note given by one Coffin to the plaintiff, by the procurement of the defendant; and that Coffin became insolvent before the note fell due, by which means the note was not paid. The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled, and repeatedly recognized in this court, that taking a note either of a debtor or of a third person for a pre-existing debt is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid." The court in its opinion refers to the case of *Murray v. Gouverneur*, decided in the court of errors, in 1800, where it was held that re-

ceipts were explainable, and that a bill was not a discharge of a precedent debt, unless by express agreement; and that a receipt of a bill *as cash* was not sufficient evidence that the bill was taken as an absolute payment. This case is cited with approval in *Egleston v. Knickerbacker* (6 *Barb.*, 458); and in that case it was decided that the paper writing sought to be explained by parol evidence was the agreement between the parties, and not a receipt, and the head-note is: "Parol evidence is inadmissible to contradict or explain a written agreement." This case was relied upon as the basis of the decision of *Coon v. Knap* (4 *Seld.*, 402). There it was held that parol evidence was not admissible to explain a release, and that the paper offered in that case was not a simple receipt, which it was conceded could be explained or varied by parol evidence. The paper writing in that case was in effect a release of the defendant from all liability occasioned by that transaction.

In *Filkins v. Whyland* (24 *N. Y.*, 338), this court had occasion to consider the question whether a writing in this form—"F. Bought of W. one horse, \$150, received payment, W."—given upon the purchase of and payment for the horse, was a mere receipt, and held that the same was a mere receipt, and not a contract or bill of sale, so as to exclude parol evidence of a warranty of soundness of the horse by the vendor. Judge WRIGHT, in his opinion in this case, says: "The paper in this case is to be construed as a simple receipt, delivered and accepted as evidence of payment, and not the contract by which the title to the horse was transferred. The paper cannot be read as a present agreement of sale. It contains no stipulations to sell or to buy, nor declares any present undertaking by either party. The vendor acknowledges payment, but he does not profess, by the writing, to sell. The vendee does not execute, but accepts it. It recites the fact of a past sale. It admits that a sale has been had, but does not effect one. A merchant's bill of items of goods sold, made up and receipted in the same form, has never been regarded as the written contract of sale."

Buswell v. Poiner.

These observations are pertinent to the case at bar, and conclusively show that the four paper writings relied upon by the defendant to sustain the defense set up in his answer, were neither releases, contracts of sale, or agreements, but simple receipts which, upon most abundant authority, could be explained by parol evidence. And the court properly overruled the objection to the admission of such evidence.

The exception to the charge of the judge that such receipts might be explained by parol testimony is equally untenable. The general term of the supreme court was incorrect in holding that there was error in those particulars, and reversing the judgment, and ordering a new trial. This makes it unnecessary to examine the exception taken to the judge's charge in reference to the alleged fraud of the defendant, in transferring the notes of Mann, Kendrick & Co., knowing that the same were not good, and would not be paid.

The order granting a new trial should be reversed, and the judgment on the verdict should be affirmed, with costs.

All the judges concurred, except GROVER and PARKER, JJ.

Judgment accordingly.

SEACORD *against* MORGAN.*Court of Appeals ; September, 1867.*

UNDERTAKING ON APPEAL.—LIABILITY OF SURETIES.

The defendants gave an undertaking upon an appeal taken by two appellants, that "if the said judgment so appealed from, or any part thereof, be affirmed, the said appellants will pay the amount," &c. The judgment was affirmed as against *one* appellant, but was *reversed* as to the other.—*Held*, that the defendants were liable upon their undertaking.

Appeal from a judgment of the supreme court.

The action was brought by Franklin B. Seacord against Caleb Morgan and John Warrin. The facts involved are stated in the opinion.

William H. Taggard, for the appellants.

S. E. Lyon, for the respondents.

DAVIES, Ch. J.—In the year 1850, the plaintiff in this action commenced a suit in the supreme court of this State against Nicholas Miller and Leonard P. Miller. The plaintiff claimed to recover upon a promissory note made by Nicholas Miller, and indorsed by Leonard P. Miller. The maker and indorser, though not jointly liable, were, in pursuance of the provisions of our statute, united as defendants in the same action. Such proceedings were had in the supreme court, that, on the 20th day of April, 1853, the plaintiffs herein recovered judgment against said Nicholas Miller and Leonard P. Miller, defendants, for the sum of \$261.54.

The defendants in that action appealed from said judg-

ment to this court, and thereupon the defendants in this action, for the purpose of making said appeal effectual, and in compliance with the provisions of the Code, made and executed to the plaintiff in this action an undertaking, in the usual form, with a condition therein in these words: "Now, therefore, we, John Warrin and Caleb Morgan, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellants will pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars; and do also undertake, that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellants will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellants on the said appeal."

Upon such appeal, this court affirmed the judgment of the supreme court against Nicholas Miller, the maker of said promissory note, and reversed the judgment of the supreme court against said Leonard P. Miller, indorser of said note, and judgment was rendered in his favor (*Seacord v. Miller*, 13 *N. Y.* [3 *Kern.*], 55).

The plaintiff now brings an action upon said undertaking, and avers that the said judgment mentioned in said undertaking was affirmed as to the said appellant, Nicholas Miller, with costs, and reversed as to the said appellant, Leonard P. Miller; that judgment had been perfected in said supreme court, upon the judgment of said court of appeals; that an execution had been issued for the amount thereof against the property of said Nicholas Miller; that the same had been duly demanded of said Nicholas Miller; and that the defendants had notice thereof. The defendants denied all the matter set forth in the complaint, and the action was referred to William Kent, as referee, who found all the facts, as stated and set forth in the complaint; also, that the amount of said judgment against said Nicholas Miller was \$479.42, besides interest; and that the same had not

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been paid, nor any part thereof, but that the same remained unpaid, and entirely unsatisfied; and found, as conclusions of law, that the undertaking was a valid obligation; that the judgment entered against the said Nicholas Miller in the supreme court, on filing the *remititur* from the court of appeals, was duly entered against him, affirming the said judgment so appealed from, and that by the affirmance of the judgment against Nicholas Miller, and the facts in said report contained, the defendants became bound and indebted to the said plaintiff for the amount of said judgment, and the interest thereon. Judgment was accordingly entered for the said plaintiff, and on appeal the same was affirmed at general term, and the defendants now appeal to this court.

The only question of a serious nature urged upon us for a reversal of this judgment, is, that as it appears affirmatively that the judgment appealed from was against two defendants, and as it was affirmed only as to one defendant, and reversed as to the other, the event or contingency upon which these defendants agreed and undertook to pay the judgment appealed from, has never happened. They undertook, that if the judgment so appealed from should be affirmed, then the appellants would pay the amount directed to be paid by the said judgment, and all damages which might be awarded against the said appellants on the said appeal.

The defendants contended that the judgment so appealed from has not been affirmed.

There is some plausibility, it must be confessed, in this position, and it has been sustained by a very ingenious and able argument by the counsel for the appellants, and were it an open question in this court, it would be proper to proceed with the discussion of the views suggested.

But, as we understand, the precise question now presented was considered and passed upon by this court in the case of *Gardner v. Barney and Butler*, decided here in December, 1863—not reported. That was an action upon an undertaking given by the defendants, on an ap-

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peal from a judgment of the special term to the general term of the supreme court, taken by the defendants, Ogden and Smith. The judgment of the special term was against both defendants, and the appeal was from that judgment by them to the general term. And the undertaking was similar in form to that given by these defendants. The general term of the third district reversed the judgment, and ordered a new trial. From this order the plaintiff, Gardner, appealed to this court, and this court reversed the order of the general term, granting a new trial, so far as it related to the defendant, Smith, and affirmed the judgment of the special term as to him, with costs. It also affirmed the order granting a new trial as to the defendant, Ogden, and gave judgment in his favor against the plaintiff, with costs (*Gardner v. Ogden*, 22 *N. Y.*, 327).

The action in this court, above referred to, against Barney and Butler, was upon the undertaking given on the appeal taken by Ogden and Smith from the judgment against them at special term to the general term; and the question, as stated by DENIO, Ch. J., in the opinion of this court, whether the affirmance of the judgment as to one of the defendants, who were together adjudged to pay a sum of money in the original action, rendered the defendants liable as sureties upon the undertaking.

That question is very carefully and fully discussed by the learned chief judge. And as his views upon this point have never been reported, and are so conclusive upon the point under discussion, and received on that occasion the approval of this court, it is not deemed inappropriate to quote them. Nothing further need be added upon the subject.

Judge DENIO said: "The expressions of the undertaking, which provide for the case upon affirmance, only in part, appear to have reference primarily to the amount, and not to the number of persons charged. The language is, that the appellants, in the case of a partial affirmance, will pay the amount directed to be paid by the judgment, or *the part of such amount* as to which it shall be af-

firmed, if it be affirmed only in part. But independent of these words, I am still of opinion that this judgment has been affirmed, according to the general sense of the instrument.

“The decision that the plaintiff is entitled to the amount of money adjudged to him by the special term, is sustained, and the position is upheld, that he is entitled to recover it in action. It was a case in which several damages might be given against one of the defendants, though the other should be acquitted. This is established by a judgment, affirming the recovery as to Smith alone. The judgment of the special term has, therefore, been affirmed, with a variation, however, in this—that the recovery is to be satisfied by one, and not by both of the defendants. It is not necessary to depart from the language of the instrument in order to charge the sureties. They are to abide according to the terms of their undertaking.

“There has been an affirmance of the judgment appealed from, and equitable construction cannot be resorted to for the purpose of charging sureties. But if the case is within the letter of their contract, they are liable, unless there is something in the spirit and intention of the instrument, or of the law under which it is given, which exonerates them. The object of the undertaking is to procure an absolute stay of execution, and of all proceedings on the judgment, and such is its effect (*Code*, §§ 335, 339).

“The motive for requiring the undertaking was to secure to the plaintiff the fruits of the recovery, in case it should be determined that the allegations of error were unfounded. As the plaintiff is, by the stay of execution, deprived of the immediate resort to the property of the judgment debtor, which the law would otherwise give him, and as his title to the amount adjudged in his favor is *prima facie* established, it was the policy of the law that he should have security to indemnify him against the possible contingency of the delay. The law assumes the judgment to be such presumptive evidence of his right,

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that it will not subject him to the hazard arising from the delay of further litigation, without an indemnity against any loss which he might thereby incur. If it should be decided, that in order to hold the sureties the judgment should be affirmed in all its parts, without variation or modification, the provisions for security would be illusory in a great variety of cases, which may be supposed.

“Let us take the case of an equity suit against two defendants, and a judgment in a primary court against one, and an acquittal of the other, and cross-appeals by the plaintiff as to the discharge of the one acquitted, and by the defendant, who was held liable; and that the appellate court should hold that both were liable, and give judgment accordingly. It is plain that the sureties of the defendant, who was held liable by the first judgment, ought not to be discharged, for the complaint of that defendant against the judgment would be shown to be unfounded, and the plaintiff would have incurred the hazard against which the undertaking was intended to protect him; and yet it could not be said that the identical judgment appealed from had been affirmed in every particular. The system of the provisions respecting security on appeals is explained by section 366 of the *Code*, as to judgments directing the assignment or delivery of documents or personal property. The undertaking in that case was to the effect, that the appellant would obey the order of the appellate court, on the appeal. This shows the general intention of the legislature, that the judgment of the primary court should not be delayed in its execution, unless the party charged should give security to abide the judgment of the superior court, if it should be adverse to him, without requiring that the same identical judgment should be sustained.

“The nature of the original action, and the liabilities upon which the recovery was had, are not stated in the present case. We may suppose them to have been what we know, by looking into the former case, they were—an alleged breach of duty on the part of defendant, Ogden, as member of the firm, who were the agents of the plain-

tiff for the sale of his land, in disposing of it in bad faith, and for a less price than it was worth, the defendant, Smith, being the buyer, under such circumstances as would estop him of the defense of a *bona fide* purchaser. Both the defendants were held liable for the supposed value of the land ; and although the judgment was joint in form, each was made liable on account of his supposed individual misconduct, and not on account of the delinquency of the other. It was more like a judgment against two tort feasers than one against joint debtors. In such cases the appeal is, in effect, several by each defendant ; and it would have been perfectly correct for each defendant to have brought a separate appeal, and to have given a separate undertaking, though it was not irregular for them to join in the appeal and procure a single undertaking. But the proper construction of the instrument is, that the sureties undertake for each of the defendants. The defendant, Smith, was made liable for the value of the land, on account of his having purchased it at a voidable sale, under circumstances which would not enable him to hold it against the plaintiff's equity ; and Ogden was held liable to the same amount for having sold the land to Smith in violation of his duty ; and the judgment contained a provision that Smith might satisfy the amount by reconveying such part of the land as he had not disposed of to others, and assigning and paying to the plaintiff the securities and money which he had received for the part sold by him. Now, it might very well be that the judgment could be sustained against one, while the other should be acquitted, and such was, in fact, the judgment of this court, which was in favor of Ogden, on the ground that he, being absent from the country, had no personal concern with the alleged illegal purchase from the plaintiff. The appeal taken under such circumstances was, in effect, several by each defendant, and the undertaking should be construed in connection with the judgment. Viewed in that light, the sureties must be considered as undertaking in behalf of Smith, that if the judgment against him, from which he had appealed, be affirmed, he should pay the

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amount adjudged ; and so of the defendant, Ogden. If the sureties were bound separately for each defendant, in respect to the judgment against each, as, I think, they were, it is of no consequence that there was a reversal as to one of them. The terms of the contract adjust themselves to the case as it actually existed ; and it is the same thing as though each had appeared separately, and the sureties had signed a separate undertaking upon each appeal. Though the nature of the action in the original suit, and the grounds of the judgment, were not found on that under review, neither was it shown that the judgment was one against joint-debtors ; and the condition annexed to it, allowing Smith to discharge it by a collateral act, shows that it was not an ordinary judgment against two persons jointly indebted. I am therefore of opinion that the objection, that the judgment has not been wholly affirmed, or affirmed as to both defendants, is not well taken."

These are the views of this court, so clearly expressed in a case so analogous to the present, that they must be regarded as controlling and not open to further discussion. It is impossible to point out any essential difference between the case under review and that in which the preceding opinion was rendered. If ever a case was *in quatuor pedibus* with another, this is with that. To the same effect is the case of *Potter v. Van Vranken* (36 N. Y., 619).

In the record now before us it distinctly appears that the original judgment was not against the defendants therein as joint-debtors, but a judgment against them upon the separate liability and contract of each. It was against Nicholas Miller, as maker of the promissory note in suit, and against Leonard P. Miller, as the endorser thereof ; and, as was observed in *Gardner v. Barney*, it might very well be that, under such circumstances, the judgment might well be sustained against one defendant, while the judgment against the other would not be allowed to stand.

Then the appeal, in effect, was in this case, as in that, a several appeal by each defendant ; and we are to construe the undertaking to refer to the character of the judgment it

was given to secure. In that light we must hold that the sureties are to be regarded as undertaking, on behalf of Nicholas Miller, that if the judgment against him, from which he had appealed, should be affirmed, he would pay the amount of the judgment; and the same as to the other defendant. Now, the judgment against the defendant Nicholas Miller was affirmed by this court, and upon such affirmance, the liability of his sureties to pay the judgment so affirmed became absolute. It was not impaired by the circumstance that this court reversed the judgment of the supreme court against the other defendant, Leonard P. Miller. It is not denied that if each defendant had taken a separate appeal to this court from the judgment against him, and an undertaking had been executed upon each appeal, that in case of the affirmance of the judgment upon either appeal, the sureties in respect thereto would have been fixed, although the judgment on the other appeal had been reversed. We held in *Gardner v. Barney*, that in a case like the present, it is the same thing as though each defendant had appealed separately, and the sureties had signed a separate undertaking upon each appeal. That is decisive of the case at bar.

The finding of the referee, that the *remittitur* from this court, containing the affirmance of the judgment, was filed in the supreme court by its order, is conclusive of the facts, and of the regularity of the plaintiff's proceedings. We have no doubt of the power of the supreme court to direct the order to be entered, making the judgment of that court, *nunc pro tunc* (*Chautauqua County Bank v. White*, 23 N. Y., 347).

The judgment appealed from should be affirmed, with costs.

PORTER, PARKER, WRIGHT and GROVER, JJ., concurred.

Judgment affirmed.

BRETZ *against* THE MAYOR, &c. OF NEW YORK.*New York Superior Court ; General Term, May, 1868.*

PUBLIC STATUTE.—TAKING JUDICIAL NOTICE.

A statute which is private or local in many of its provisions, may contain a section which is of a public or general character; in which case, the courts will take judicial notice of such section.

Section 6 of the act of April 23, 1867 (2 *Laws of* 1867, 1,606, ch. 586),—providing that actions against the corporation of the city of New York shall be brought in the supreme court of the first district,—is a public statute, and, although not pleaded, renders it the duty of any other court in which such an action is brought, to sustain a demurrer if interposed to the jurisdiction.

That enactment is constitutional.

Appeal from an order overruling a demurrer.

The plaintiff brought this action to recover damages for personal injuries sustained by him from being thrown from his carriage in consequence of obstructions left by the agents of the defendants in the Eighth Avenue in the city of New York.

The defendants demurred to the complaint. The only ground of demurrer urged, was, that since the enactment of 2 *Laws of* 1867, 1,606, ch. 586, § 6,—giving the supreme court in the first district exclusive jurisdiction of actions against the city,—the superior court could not take jurisdiction of such a cause. At the special term the demurrer was overruled, upon the ground that the statute must be pleaded to enable the court to take cognizance of it. The defendants now appealed from this decision.

The decision at special term is reported, 3 *ante*, 478.

Bretz v. The Mayor, &c. of New York.

Richard O'Gorman, corporation counsel, for the appellants.

A. H. Reavey, for the respondent.

BY THE COURT.—GARVIN, J.—This case comes before us on an appeal from an order made at special term overruling a demurrer to the complaint, and ordering judgment for the plaintiff. The defendants insist that this court has no jurisdiction of the action, claiming that section 6 of *Laws of 1867*, chapter 586, in all actions against the mayor, aldermen, &c. of the city of New York, confers exclusive jurisdiction upon the supreme court, and thus precludes this court from entertaining the case. The plaintiff contends that the statute is private and local, and not being set out or referred to in the pleadings, the court will not regard it.

As to private and local enactments, this is the rule. Therefore, whether the sixth section is a public or private and local statute, is the question, not whether the act is private or local in its principal provisions. An act of the legislature may be local and private in many of its provisions, and yet contain an enactment which is neither local nor private (*Williams v. The People*, 24 *N. Y.*, 406). If a public statute, the courts are bound to notice it. If this court has no jurisdiction of the action, the demurrer must be sustained so far as this particular question has any influence upon its action. But if for any cause the act itself or this enactment is unconstitutional, then the decision made by the court at special term is right. If the section is unconstitutional it is void, and the jurisdiction of the court remains the same, unaffected by the enactment.

The clause of the section in question provides that hereafter all actions against the mayor, aldermen and commonalty of the city of New York shall be brought in the supreme court, which court shall have exclusive cognizance of such actions. The supreme court had jurisdiction of such actions before 1867, but by this provision

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that jurisdiction is now exclusive. It is enacted not only that all actions against the corporation shall be brought in the supreme court, but that that court shall have exclusive jurisdiction thereof. The legislature intended to effect two purposes: (1.) to confer exclusive jurisdiction upon the supreme court; and (2.) to absolutely take from every other court in the State, in the first instance, the power to entertain any action wherein the corporation of the city of New York are defendants.

The enactment is essentially public in its object and purposes. We are not without authority upon the question. It has been held in *People v. McCann* (16 *N. Y.*, 58), that an act local in its general provisions, may contain a section which is public in its character, as contradistinguished from one private or local. That section contained provisions in relation to the courts of oyer and terminer of the State generally. It was held to be a public statute. This principle is approved by DENIO, Justice, in *Williams v. The People* (24 *N. Y.*, 405). Can it be said an enactment referring to one class of criminal cases is public, and another in regard to a class of civil cases is private, when each prescribes a rule by which parties and courts are to be governed, neither imposing either penalty or forfeiture? I think not.

A further examination of the case may be useful, putting the case in a still stronger light. All courts are bound to look to and take notice of provisions touching their powers and jurisdiction, whether found in the constitution or statutes of the State. This court derived its powers originally from the statutes enacted by the legislature;—its continuance, with the powers and jurisdiction then possessed from the constitution of 1846, “until otherwise directed by the legislature.” There can be no doubt of the power of the legislature to add to or take from the power and jurisdiction of the court. The addition of the last clause of section 6, by way of amendment to the act organizing the court, would deprive the court of jurisdiction of all actions against the city, just as clearly as if it had been in the original statute. Must not the

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court take judicial notice of the act bringing it into existence, defining its powers, and all provisions enlarging or restricting its jurisdiction? The court of errors, in *Morris v. The People* (3 *Den.*, 381), in regard to the act declaring the arrears of the salary of a judge of the court of general sessions a county charge, and directing the board of supervisors to audit and allow it, held it was not an appropriation of money for "local or private" purposes, and there was no force in the objection that it was a bill appropriating the public moneys for "local or private purposes," and did not require a two-thirds vote to pass it (*Const. of 1821*, art. 7, § 9). The same principle was reiterated in *Conner v. The Mayor*, (5 *N. Y.* [1 *Seld.*], 285), changing the mode of compensating the county clerk of New York (among other officials), by the payment of a salary in lieu of fees. "Acts concerning all persons generally are deemed public, as distinguished from private acts, though it be in regard to a special or particular thing, such as a statute concerning the circuit court, oyer and terminer, woods in forest" (*Bac. Abr.*, *tit. Statutes*, *F*).

The same rule is laid down in *Williams v. The People*. DENIO, Justice, says, that an enactment which "prescribes the rule of conduct for all persons, whether residents in the city, or any other portion of the State," is a public and not a private statute, because incorporated in the same act containing local provisions. There certainly can be no doubt about its constitutionality if it is a public statute. The application of these principles to the case under consideration is obvious.

The order below should be vacated, and judgment ordered for the defendants upon the demurrer, without costs.

MONELL, J.—Since the demurrer in this case was decided by me at special term, my attention has been drawn to the case of *The People v. McCann* (16 *N. Y.*, 58), which, as a decision of the court of last resort in this State, is controlling upon the only point noticed by me.

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That case, although cited by the defendants' counsel, was not specially called to my attention on the argument of the demurrer at special term. A re-examination of the case upon the appeal from my decision, has led to a careful perusal of the case of *The People v. McCann*, and as it seems to me to very clearly hold that a provision of a public nature inserted in a local act does not render the latter unconstitutional and void, I am of course bound to follow and adopt the law of that case.

I have no doubt that the provisions contained in section 6 of chapter 586 of the Laws of 1867, standing by themselves, are of a public nature. They relate to actions against the corporation of the city of New York, and confine jurisdiction over such actions to the supreme court. There is, however, no restriction upon the right to sue by any person having a cause of action, and therefore every person is or may be brought within the purview of the statute, though he may not select the forum or tribunal where he will bring his action. These provisions are not unlike those which in the *People v. McCann* were held to be of a public nature. As the decision of the special term was placed solely on the ground that the act referred to was a private and not a public statute of which the court would not take judicial notice, and as that objection is now removed by the authority of the case I have cited, it leaves any other objections to the statute open for examination. I fully concur in the views expressed by my associate, Mr. Justice GARVIN, that the superior court, deriving its jurisdiction and powers wholly from the legislature, may be deprived of such jurisdiction at the pleasure of the legislature; and that therefore it was competent for the legislature, to confer jurisdiction over actions against the corporation of the city of New York to the supreme court. I somewhat more at large expressed my views on this subject in the recent case of *Burnham v. Acton* (see 4 *Abb. Pr. N. S.*, 1).

It has been suggested that the statute of 1867 is in conflict with the provisions of the constitution, that "all corporations shall have right to sue and shall be subject

to be sued in all courts in like cases as natural persons" (*Const.*, Art. 8, § 3), but I think without considering the doubt whether municipal corporations are included in the constitutional provision, that it is very clear that it was only intended to subject corporations to the jurisdiction of such courts as had jurisdiction at the time the corporation was sued, and not to deprive the legislature of the power of diminishing or wholly destroying the powers of any court not created or protected by the constitution. Such power of the legislature cannot be taken from it by implication merely. But corporations are subject to be sued in all courts in like manner as natural persons; and jurisdiction over such persons has frequently been enlarged or diminished by the legislature.

The general power of the legislature over courts of local or inferior jurisdiction was considered in *Exp. McCollum* (1 *Cow.*, 450, 551), and the power of the legislature was there recognized and sustained.

I concur in reversing the order overruling the demurrer.

GORDON *against* HOSTETTER.

Court of Appeals; September, 1867.

CONVERSION OF MONEY.—FORM OF ACTION.

Money is as much the subject of conversion as is any other personal chattel. An action for damages for the conversion of money of the plaintiff to the defendant's own use, may be sustained without proving the specific description of the bills or coin converted. Proof of defendant's admissions of the conversion and the amount taken, may be sufficient.

It seems that although the complaint charges a conversion of money of the plaintiff, by the defendant, and claims damages, and the evidence fails to

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show a conversion, yet if it appears that the defendant has received the money in question to the plaintiff's use, the plaintiff may, under the code of procedure, recover as for money received.

Appeal from a judgment.

This action was brought by Robert Gordon and James Purse against L. H. Hostetter, to recover damages for the conversion of money alleged to have been embezzled from them by the defendant.

The complaint alleged that, between the month of September, 1860, and the succeeding January, the defendant wrongfully took and converted to his own use certain money, the property of the plaintiffs, consisting of bank-bills, and of gold and silver coin, of the amount and value of \$90, to the plaintiff's damage \$100; for which they demanded judgment.

The answer denied each of these allegations.

The cause was tried at the Oswego circuit. It appeared on the trial that the plaintiff's were merchants doing business at Oswego, and that the defendant was in their employ as a sales-clerk in their store, from October 12 to December 20, 1860. There were eight clerks in the store, all of whom were salesmen; and the course of business was this: Each clerk sold goods, received the pay, and put the money in the drawer. The plaintiff's had no cashier, and they kept no account of sales during the day. They entered at night, in the cash-book, the amount of the day's sales, arriving at the sum by the amount found in the cash drawers at night. The duty of the defendant was simply to sell goods, to receive the money, and put it in the cash-drawers. He was engaged at a salary of \$325 a year, and was about twenty-four years of age. He had received small sums in payment at different times, which he was in the habit of charging to himself, at the time of payment, in the plaintiff's book.

There was a balance still due on his salary, which the plaintiffs, on the trial, offered to allow, in diminution of the amount claimed, but his counsel declined to accept it.

While the defendant was in their employ, the plaintiffs missed money several times, but none as to which they could speak with certainty, except a quantity of gold, amounting to about \$15, which they missed about a week before he left. He was arrested at the store on December 20. After he was taken, he requested the chief of police and his assistant to return with him to the store, that he might have an interview with Gordon, the plaintiff. The latter refused to converse with him, except in the presence of the officers. He asked Gordon what they were going to do with him. Gordon said they were going to send him to State prison. He asked if Gordon supposed he had stolen their money. Gordon replied that he was sure of it. The defendant asked him if it could be settled. Gordon inquired how much he had taken. The defendant answered: "Eighty-five or ninety dollars, within the last month."

Three days afterward, the plaintiff, Purse, at his request, went to see him at the police-office. The defendant told him he would like to settle it. Purse asked him what amount he had taken from them. He replied that he had taken from them, at different times, from \$85 to \$90; not to exceed \$90.

The above facts were undisputed. The defendant's counsel, however, moved for a dismissal of the complaint, insisting, among other things, that the plaintiffs had not shown that they owned, or that the defendant had converted, any specific money, either in bills or coin; that, for aught that appeared, he had received the money, as their clerk, from the customers, without putting it in the drawer, and that in that case they had mistaken their remedy, which should have been by an action for money had and received; and that, if he had converted the money, as alleged, it was an act of felony, for which he could not be held civilly responsible until after conviction. The motion was denied, and the defendant excepted.

No evidence being offered on his part, the jury, under the direction of the judge, rendered a verdict in favor of the plaintiffs for \$87.10.

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The court reserved the case for further consideration, and finally ruled as matter of law :

1. That the action, being in the nature of trover, could not be maintained without proof that certain specific property had been converted by the defendant.

2. That under the complaint the plaintiffs were not entitled to recover for money had and received, generally, to the plaintiffs' use.

3. That they were not entitled so to amend the complaint as to enable them to recover in that form.

4. That they had failed to prove the conversion of any particular money, except the \$15 in gold.

5. That the verdict should be reduced to \$15, unless the plaintiffs elected to submit to a nonsuit.

The plaintiffs declined so to elect, and excepted to these several rulings. Judgment was entered on the verdict, and was affirmed, on appeal to the general term of the fifth district. The plaintiffs now appealed from the judgment of affirmance.

Daniel H. Marsh, for the appellants.

Albertus Perry, for the respondent.

PORTER, J.—The action was not for the recovery of the specific money embezzled. It was to obtain damages for the defendant's wrong in taking from the plaintiffs, and converting to his own use, coin and bills of a specific value and amount, which were alleged and proved to be their property. By taking and retaining their money, he put it out of their power to distinguish it from other like coin and bills; and while he admitted the amount taken, he claimed that he was not answerable for the wrong until they had so described what he had embezzled as to enable him to identify it. The court not only sustained this view, but also held, that under a complaint alleging the facts, and upon proof of their exact truth, he was not responsible for the amount, even as for money had and received. We think the decision erroneous, and that the

judge was right, in the first instance, in directing a verdict for the full amount in favor of the plaintiffs.

Money is as much the subject of conversion as any description of personal chattels. Under the ruling of the court in this case, a party appropriating it wrongfully would ordinarily be secure of immunity. No one, in the practical affairs of life, retains a specific description of each bill which comes to his hands. Our statute of embezzlement assumes this, in making it a criminal offense in a clerk or servant to "convert to his own use" the money of his employer, or "to make way with or to secrete it," with intent to convert it to his own use (2 *Rev. Stat.*, 678, § 59). If the fact of the unlawful taking be established, and the amount converted is ascertained, the culprit cannot avail himself of his own act, in secreting or destroying the bill, as a protection against civil or criminal prosecution.

In the present case the fact was established, by the admission of the defendant, that the money which he took was the property of the plaintiffs; and, as the amount was conceded, there was no occasion to prove the particulars in which the coin and bills in question differed from all others of like denomination. The evidence supplied every fact essential to show the conversion, and to fix the measure of damages. The money was identified, so far as was needful to determine the rights of the parties; and the plaintiffs were bound to go no further. A similar objection was raised in this court, in an action of replevin for bank bills, which were not so described in the pleadings and proofs as to distinguish them from other similar bank bills, but which corresponded in amount with the money wrongfully withheld. The appropriate answer was given by Judge GROVER, who delivered the opinion of the court: "All that is necessary is, that the proof should be sufficient to enable the court to give judgment for the delivery of the particular thing to which the plaintiff is entitled; and if the defendant has so disposed of that thing that delivery cannot be made upon the execution, then the *value* is to be collected of the defendant in satis-

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faction of the judgment" (Graves v. Dudley, 20 N. Y., 80). So, in this case, all that the court could require was proof of property in the plaintiffs, of conversion by the defendant, and of the damages resulting from the wrong.

It was held in an early case, that trover "lies not for money found, unless it be in a bag or chest" (Holiday v. Hicks, *Croke's Eliz.*, 661). But, in another cause, determined two years afterward, when the plaintiff obtained a verdict for the conversion of part of the contents of a bag of gold, a motion was made in arrest of judgment, on the ground "that trover and conversion of money out of a bag cannot be good, because it cannot be known." The judges held "that an action of trover and conversion of money only, was good enough, and an action well maintainable for it" (Draycot v. Piot, *Croke's Eliz.*, 818; Hall v. Dean, *Id.*, 841).

All doubt on the question arising from the legal fiction of loss and finding in the old action of trover, was set at rest, in a subsequent case in the exchequer chamber. The objection was there taken that the action would not lie for money out of a bag, which, from the nature of the case, could not be identified. "But," says Croke, "all the justices and barons agreed that it well lies; for, although it was alleged that the money lost cannot be known—and so, whether it was the plaintiff's money, whereof the trover and conversion was—yet the court said, it being found by a jury that he converted the plaintiff's money, the plaintiff had good cause of action. Wherefore, the judgment before well given was now affirmed. The justices and barons said that this action lies as well for money out of a bag as of corn which cannot be known" (Kinaston v. Moor, *Croke's Chas.*, 89). The doctrine of this case has since been accepted as settled law; and trover has been repeatedly held to lie for the conversion of determinate sums, though the specific coin and bills were not identified. "The design of this action," as was well said by Bacon, "is not to recover a thing in specie, but to recover damages for the conversion thereof" (9 *Bac. Abr.*, 651, tit. Trover, D.; *Chitt. Pl.*, 146; Jack-

son v. Anderson, 4 *Taunt.*, 24, 29 ; Kimberly v. Patchin, 19 *N. Y.*, 330 ; Dows v. Bignall, *Lalor's Supp.*, 407 ; McNaughton v. Cameron, 44 *Barb.*, 406).

The case of Orton v. Butler, on which the respondent mainly relies, is irrelevant to the question we have been considering. It arose on demurrer to a count in a declaration, which alleged that the defendant had received ten shillings to the use of the plaintiff, to be paid to him upon request ; and that upon being requested to pay it, he refused, and converted the money to his own use. The plaintiff insisted that this was a good statement of a cause of action in trover. The court sustained the demurrer, holding that to make the count sufficient in trover, he should have alleged, either that the money was his, or that it had previously been in his possession. The decision was clearly right, but it has no application to the complaint before us (5 *Barn. & Ald.*, 652).

It follows from these views that the plaintiffs were entitled to the full amount of the verdict, on the basis of a tortious conversion.

It is proper, however, to say, that even if we had arrived at a different conclusion on this point, we should hold the verdict good, as for money had and received, on the waiver by the plaintiff's of the tort alleged. It is true that, under ordinary circumstances, the refusal to pay over money had and received to the use of another, is not in law a conversion. It does not, however, follow from this, as a counter-proposition, that, under our present system of pleading, a party who has alleged and proved facts entitling him to judgment as for money had and received, will be barred from that relief by his failure to prove other and further allegations, which would have entitled him to a more stringent remedy. The material averments of the complaint, in this regard, were fully sustained by the proof. The facts were undisputed. The defendant was not misled or surprised ; and we see no reason why the plaintiffs were not at liberty to waive the tort, and amend their prayer for judgment, if they elected so to do, in view of the adverse ruling of the court (Byxbie

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v. Wood, 24 *N. Y.*, 607; *Wright v. Hooker*, 10 *Id.*, 51; *Cobb v. Dows*, *Id.*, 335, 342, 346).

The supreme court was clearly right in holding that, under our statute, the civil remedy of the plaintiffs was neither merged in the alleged felony, nor suspended until the conviction of the offender (2 *Rev. Stat.*, 292, § 2; *Code*, 7).

Other objections were raised on the trial, but it is sufficient to say that we do not consider them well founded.

The judgment should be reversed, with final judgment for the plaintiffs on the original verdict.

All the judges concurred.

Judgment accordingly.

MOTT *against* THE UNION BANK.

Court of Appeals ; September, 1867.

JUDGMENT.—ORDER OF ARREST.

In general, an order of arrest cannot be made after judgment.

But where after a judgment upon default, an order is made opening the default, and allowing the defendant to come in and defend, although it directs that the judgment shall stand as security, an order of arrest may be made.

Appeal from a judgment.

This action was brought by Garritt S. Mott, against the Union Bank of the city of New York. The facts of the case are stated in the opinion.

PARKER, J.—This action was brought in the superior court of the city of New York, for an alleged false imprisonment of the plaintiff. The defendant justified under an order of arrest made Dec. 8, 1858, by a justice of the supreme court, in an action commenced in that court by this defendant against this plaintiff and Jacob H. Mott, for fraud.

An order of arrest was obtained at the commencement of that action, under which Jacob H. Mott was arrested and held to bail, but this plaintiff was not found. He subsequently appeared in the action by attorney, but put in no answer to the complaint; and on Nov. 5, 1858, judgment was taken against him by default. After this, and on Nov. 11, 1858, he moved the court to set aside the default and judgment, whereupon the following order was made: "It is ordered, that the said defendant have leave to serve his answer to the complaint herein within ten days from the date of the entry of this order, and to proceed with his defense in this action, upon payment to the plaintiff's attorney of \$22.50, being costs of default and of this motion, and also the fees and charges of the sheriff upon the execution issued in this action. And it is further ordered, that such judgment stand as security for the alleged indebtedness of the said defendant to the plaintiff." He accordingly paid the costs, fees and charges mentioned in the order, and served his answer to the complaint. On Dec. 8, following, the order of arrest upon which he was arrested and held to bail, and under which defendant justifies, was obtained, and plaintiff was arrested, and, in default of bail, committed to jail. For that arrest and imprisonment this action is brought.

Upon the trial the court held that the defendant was justified by the order, and dismissed the complaint, to which the plaintiff excepted. The court ordered the exceptions to be heard in the first instance at the general term, and that, in the meantime, judgment be suspended. On hearing the exceptions the general term denied a new trial, and gave judgment for the defendant, from which judgment this appeal is brought.

Unless the order of arrest upon which the plaintiff was arrested and imprisoned was void, the judgment is mani-

festly right. The only question, then, is, was the order of arrest unauthorized and void?

The only ground upon which it is claimed by the plaintiff to be void, is, that it was made after judgment.

Section 183 of the code provides, in reference to the making of the order by the judge by whom it was granted, that "the order may be made to accompany the summons, or at any time afterwards, *before judgment.*" It is clear that this language is a clear prohibition of the making of the order after judgment, and the reason obviously is, that after judgment the need and office of the *provisional* remedy ceases. If the action is one in which an order of arrest may be granted, upon the perfecting of judgment therein an execution may issue against the person of the defendant. There can be, therefore, no further need of the order of arrest. This reason helps to construe the provision, and show what is intended by the word "judgment," as it occurs in the section. The court below, I think, gave it the correct meaning when it held that it meant in section 183, what it is defined to mean in section 245, to wit: "the final determination of the rights of the parties in the action." Until such a judgment is obtained,—one which may be carried into effect by execution,—the point has not been reached where the provisional remedy is no longer necessary; and for this reason, as well as for those assigned by the court below (8 *Bosw.*, 591), the granting of the order should be held to be limited only by such a judgment.

The judgment which was obtained by default, was undoubtedly such a judgment, until it was modified by the order letting the present plaintiff in to answer and litigate the claim set up in the complaint, and at the same time directing that the judgment "stand as security for the alleged indebtedness of the defendant to the plaintiff." The court has authority, under its general powers, as well as under section 174 of the code, in its discretion, and upon such terms as it conceives to be just, to "relieve a party from a judgment," and "allow an answer to be made." In pursuance of this authority, it may modify the judgment by depriving it of its ordinary character, as

a *res judicata*, and leaving it in full force as a lien or collateral security (6 *Cow.*, 390; 7 *Id.*, 477; 2 *Johns. Cas.*, 286; 9 *How. Pr.*, 442). That, it clearly did in this case. I agree entirely with the court below, that "in substance and in form (the judgment and order of the 11th of November being read together), the judgment is one which neither acknowledges nor establishes any indebtedness of G. S. Mott to the bank, but is a judgment given as security for the payment of any sum that the bank should establish that Mott was liable to pay, and given in order to vacate the judgment in all respects, except to exist merely as such security. It was to perform the same precise office as a judgment confessed without action, for the same purpose, and no other."

The order places the parties back where they were before the judgment was entered, sets aside the default, and provides for the litigation of their rights in the action. The execution of the judgment would be plainly inconsistent with the right to litigate thus conferred. The judgment, then, thus modified, and standing only as a lien or security, and not as the final determination of the rights of the parties, was no legal obstacle in the way of a valid order of arrest.

It follows, if this view is correct, that the judgment appealed from is right, and should be affirmed.

WRIGHT, GROVER, HUNT and DAVIES, JJ., concurred.

Judgment affirmed.

WATSON *against* BAUER.

Supreme Court, Second District; General Term, Dec., 1867.

NEGLIGENCE.—BURDEN OF PROOF.

Where negligence is charged affirmatively, it must be proved.

Proof that a horse loaned to defendant by plaintiff, was, at the time of the loan, in good condition, but was subsequently returned damaged, is not sufficient to cast the burden of disproving negligence upon the bailor.

Watson v. Bauer.

Slight proof of negligence, however, is sufficient in such case.

Any witness acquainted with the value of a chattel, is competent to state his opinion thereof.

Appeal from a judgment.

This was an action to recover damages for injuries to a horse loaned by plaintiff to the defendant. The defendant moved, on the trial, for a nonsuit, on the ground that no affirmative proof of negligence on the part of the defendant had been given. The motion was denied ; to which defendant excepted.

The plaintiff having recovered judgment, the defendant appealed upon the above-mentioned exception, and upon others taken to rulings of the referee upon questions of cordence, the nature of which appears from the opinion.

H. A. Meyenburg, for the appellant.

Edward J. Maxwell and *William Leggett Whiting*, for the respondent.

BY THE COURT.*—J. F. BARNARD, J.—This action was brought by the plaintiff to recover damages of the defendant for injuries done to the plaintiff's horse by the carelessness and negligence of the defendant. When the plaintiff rested his case, the evidence established only that the plaintiff had loaned to the defendant the horse in question to be used for about an hour before a light wagon, and that the defendant had received the horse in good condition and returned the same lame. The defendant moved for a nonsuit on the ground that no negligence had been proved. The referee denied the motion. The defendant was then sworn as a witness, and it appeared by his testimony, and the testimony of another witness, that he attached the horse to his, the defendant's, bread wagon, weighing, empty, about eight hundred pounds, with about three hundred pounds of bread, and in which were two men. That the horse was lame immediately or soon after starting. That notwithstanding such

* Present, LOTT, GILBERT and J. F. BARNARD, JJ.

visible lameness, the defendant continued to drive the horse for about five hours and a half.

The proof of plaintiff, alone, did not make out a cause of action. Negligence must be proved. In a case of this kind, where the loan is gratuitous, the highest degree of care and skill is required in the use of the property loaned. Therefore, slight proof would have been sufficient; but the plaintiff furnished none.

The defendant, however, supplied this proof; he saw the animal was lame soon after starting. The load was heavy, probably at least fourteen hundred pounds; he used the horse in this condition for over four hours. It was not a prudent and careful treatment and use of plaintiff's property. It was sufficient to convert a harmless strain and injury into a permanent disability, such as the witnesses described to have been the condition of the horse at the time of the return to plaintiff.

The exceptions made by the defendant upon the trial were not worth taking. It is competent for any person acquainted with the value of property to give his opinion thereof. The fact of value can be proved by such evidence. The appearance and condition of the horse could be proved by any observing witness to the extent permitted on the trial. That the horse appeared lively, and did not show lameness before plaintiff delivered the same to the defendant, and that there was apparent excessive lameness and distress after the return, are facts not necessary to be proved by scientific witnesses.

The judgment should be affirmed, with costs.

BATES *against* ROSEKRANS.*Court of Appeals; September, 1867.*

PAYMENT BY NOTE.—COUNTER-CLAIM.

The giving of a new note by one of two joint and several makers of a former note, as a provision for the payment of the former note, but without an agreement that such new note shall be received as payment, and without its being in fact paid, constitutes no defense to the original note.

A demand against a plaintiff which exists in favor, not of the defendant, but of a third person, cannot be the basis of a counter-claim, so that the averment of it in the answer will be deemed admitted if not traversed by a reply.

A statement in an answer of a demand against plaintiff, which contains no expressions importing that the defendant claims to recover upon it against the plaintiff, does not constitute a counter-claim, but should be treated as a defense, merely.

Appeal from a judgment.

This action was brought upon a joint and several promissory note, dated September 11, 1851, for the sum of two thousand five hundred and fifty-three dollars and seventy-one cents, made by the defendant and one Andrew Bigham, payable to the order of, and endorsed by, Bates & Griffin.

On the trial, the defendant's counsel made a motion for judgment upon the pleadings, upon the ground that the plaintiff had not replied to the counter-claims of the defendant contained in the answer.

The court overruled the motion, and the defendant's counsel excepted.

The plaintiff's counsel then read in evidence the note above described, and proved the amount of interest due upon the same.

The defendant's counsel then read in evidence a former complaint in the action, verified by the plaintiff, in which it was alleged that, after the making, and before the maturity of the note sued upon, "the defendant, in consideration of his indebtedness upon said note, and to provide for the payment of the principal of the same, made and delivered to the plaintiff another promissory note, dated," &c. ; that neither of said notes were paid, and the plaintiff was the owner of both of them.

The plaintiff's counsel then produced and canceled the note last mentioned.

The defendant's counsel insisted that the defense of payment was established by the evidence thus introduced, and requested the court so to instruct the jury, and re-requested to go to the jury on that question. The court declined each of these requests, and the defendant's counsel excepted.

The court directed a verdict for the plaintiff. The general term affirmed the judgment entered upon the verdict, and the defendant now appealed from the judgment of the general term.

Beach & Smith, for the appellant.

Gale & Alden, for the respondent.

HUNT, J.—The facts recited in the amended pleading introduced in evidence did not establish a payment.

Before the maturity of the original note, "and to provide for the payment of the same," one of the joint and several makers thereof delivered to the holder his own note payable to the same parties in the original note named. Providing for the payment of a note, and the actual payment thereof, are quite different things. In the case in hand, the same evidence that showed a provision for payment, showed also that no payment was in fact made. As often occurs in commercial transactions, the provision failed.

That the giving of the new note, by one of two joint and several makers, intended as a provision for the pay-

Bates v. Rosekrans.

ment of a former note, not agreed to be taken in payment, and not in fact paid, constitutes no defense to an action upon the original note, is well settled. The principle is quite familiar, and of frequent occurrence (*Highland Bank v. Dubois*, 5 *Den.*, 558; *Cole v. Sackett*, 1 *Hill*, 516; *Smith v. Rogers*, 17 *Johns.*, 340).

The defendant insisted at the trial, and his counsel now argue, that he was entitled to judgment at the circuit, on the ground that the plaintiff had not replied to the counter-claims contained in his answer.

The fifth answer contains the statements that are the most strenuously insisted upon as constituting a counter-claim, and an examination of that will suffice for the whole. The defendant therein alleges, "for a further defense," that the note in the complaint described arose out of partnership transactions of which the defendant and one Bigham were members, and was given for the benefit of the partnership, which facts are known to the plaintiff; and afterward Bigham transferred all his interest in the partnership property to the plaintiff, who was then the holder of the note, and in consideration thereof the plaintiff agreed with Bigham to pay his share of the debts of the partnership, and any balance due from him to the partnership, and to cancel the note; that Bigham's share of the debts amounted to more than the note; that Bigham owed the partnership a balance greater than the amount of the note, and the plaintiff has received and holds under the assignment property of more value than the amount of the note; and that he has not paid any part of the partnership debts, and refuses to apply the partnership property to the payment of said debts.

The defendant does not pretend that he was precluded from making proof of the allegations contained in this answer, and thus establishing the equitable defense arising from the statements therein contained. He insists that by the rules of pleading in existence at the time of the trial, a "counter-claim" was to be taken as true, unless it was formally denied by the plaintiff, and that no denial having

been made in the present case, he was of right entitled to a judgment upon the pleadings.

The court below held the pleading to be an answer, and not a technical counter-claim, and overruled his demand for judgment.

This decision was right, for several reasons.

The first ground is, that the answer states no claim "existing in favor of the defendant against the plaintiff."

The code is express that the claim "must be one existing in favor of a defendant and against a plaintiff" (*Code*, § 150 ; *Vassear v. Livingston*, 13 *N. Y.* [3 *Kern.*], 248). The claim, as stated in the pleading, is in favor of Bigham, or of his representatives, if he is dead, and not of the defendant. It was Bigham, and not the defendant, who transferred the property to the plaintiff. It was to Bigham, and not to the defendant, that the plaintiff made the promise to pay the partnership debts, and to cancel the note. It was to Bigham, and not to the defendant, that he was bound to account for the property, or its proceeds, if he failed to make a proper application of it. A perfect cause of action exists in favor of Bigham, if the statements of the answer are true, possibly also in favor of the holder of the note, or a creditor of the former, but none in favor of the defendant himself, one of the debtors in the transaction (*Beardsly Scythe Co. v. Foster*, decided June Term, 1867). While it is unnecessary to decide whether these circumstances would afford an equitable defense to this action, it is clear that they do not avail the defendant in the technical aspect in which he here seeks to defeat the plaintiff's right of recovery.

I think the answer given by the court below is also a sound one, to wit: that the pleading does not purport to be a counter-claim. It designates itself as "a further defense" simply, and there rests. No particular form of words is necessary to make a pleading a counter-claim; and if the party had, in any reasonable language, intimated that he intended to make a personal claim in his own favor against the plaintiff, it would have been sufficient.

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The ordinary and most satisfactory form of giving that intimation is by a statement that the pleading is a counter-claim, or by a prayer for relief. The present pleading, however, contains no words that could have justified the plaintiff in supposing that any personal judgment was sought against him, and in preparing for that emergency.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

COLE'S CASE.

Supreme Court, Third District; Special Term, August, 1868.

SECOND TRIAL FOR MURDER.—ADMITTING TO BAIL.

The fact that upon a former trial for murder the jury disagreed, is not, of itself, a controlling reason for admitting the prisoner to bail pending a second trial.

The principles which govern criminal courts in allowing persons charged with crime to go at large upon bail,—stated.

Where, on a first trial for murder, the jury disagreed, but there was no neglect or delay on the part of the prosecution, in moving a second trial, and no satisfactory evidence that the prisoner was unable to bear the confinement, and the proofs against him upon the principal charge were of a grave character,—*Held*, that an application to discharge him on bail until the second trial, should be denied.

Habeas corpus to admit to bail.

The petitioner, George W. Cole, having been once tried upon an indictment for the murder of L. Harris Hiscock, and the jury having disagreed, now applied to be admitted to

bail until the indictment should be called for a second trial

William J. Hadley and *Amasa J. Parker*, for the petitioner.

Henry Smith, District-Attorney, opposed.

HOGEBROOM, J.—The prisoner was on a previous day brought before the court on a writ of *habeas corpus*, sued out on behalf of the defendant, to inquire into the cause of his detention, and to procure his discharge on competent bail. He is now held before this court by the officer having him in charge, awaiting a decision upon this application.

By the return to the writ and other papers, it appears that the prisoner, in June, 1867, was indicted in Albany county for the willful murder of L. Harris Hiscock; that the indictment was moved for trial at the Albany oyer and terminer held in November, 1867; that the trial was postponed on the motion of the defendant; that it was again moved at the oyer and terminer held in January, 1868, but the prisoner not being ready, the court was adjourned until April 20, 1868, at which time the trial commenced, and was concluded on May 7, afterward, resulting in a disagreement of the jury. At the Albany oyer and terminer, held on the third Monday of May, 1868, both parties appear to have been ready for, or willing to go to trial, but for reasons not very fully disclosed, but apparently growing out of the convenience of the court, the trial was not then proceeded with, nor an adjourned oyer and terminer appointed; as had been suggested and was apparently satisfactory to both sides. Since that time some effort has been made, thus far unsuccessful, to procure a judge who would be able to hold an extraordinary session of the court, under appointment from the governor, prior to the next regular session of the court on the second Monday of November next, and the district-attorney expresses the belief that such efforts will yet be suc-

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cessful, but the counsel for the prisoner intimate that he will probably now not be ready for trial until the November oyer and terminer, and mainly, as I understand them, for the reason that the brother of the prisoner, Senator Cole, of California, is just about going home, and cannot conveniently return until near the time of the re-assembling of the United States Congress.

This recital of facts tends to show that there has been no lack of due diligence on the part of the prosecuting officer in moving the trial of the prisoner, and that he is even now ready to aid in procuring the appointment of an extraordinary session of the court, if it shall be desired by the prisoner, or deemed necessary for the purposes of justice. I have the same disposition, and though originally disinclined on account of temporary ill health and other engagements, to undertake the extraordinary labor of such a court, and much preferring that another judge should be assigned to that duty, yet as the one who is appointed to hold the November oyer and terminer, I should not feel at liberty to decline presiding at an earlier and extraordinary session of the court, if the governor should deem it most proper to appoint me to that duty. There will, therefore, in all probability, be no difficulty in procuring an early trial of the indictment, if it shall be desired by the prisoner, or be consistent with his proper preparation of his case. Hence, so far as his application is grounded on the great lapse of time which has taken place since his original arrest, and will take place before he can possibly be re-tried, I do not think it ought to be granted, because, beyond what is inevitably incident to all judicial proceedings, it has arisen, and is likely to arise, for the most part, from his own action. If it should hereafter become apparent that any undue delay is caused by the public authorities, that fact may furnish reason for a favorable consideration of a renewed application to be discharged on bail.

It is further claimed that the physical condition of the prisoner requires his release on bail. But I do not see that this condition is substantially different from what it

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has heretofore been, or that his imprisonment has resulted of itself in any serious detriment to the prisoner's health. This part of the application is not very strongly supported. It rests mainly upon a single allegation in the petition of the prisoner for this writ, that, in or about the year 1862, while serving in the army, he received a severe and dangerous internal injury, from which he has ever since suffered and is still suffering, and that in his judgment his physical condition renders his discharge from imprisonment upon bail absolutely necessary. The latter clause of the sentence is a mere expression of an opinion, which, however sincerely entertained or carefully formed, must, I think, yield to the preponderating evidence that his confinement has not seriously affected his health, or so decidedly impaired the same beyond what it otherwise would have been as to give cause for serious apprehension, or to demand as a matter of humanity or duty the entertainment of the application especially upon that ground.

The only remaining question for consideration, and it is that upon which the application is principally founded, is whether the occurrences or the result of the previous trial give such a character to the transaction as justify or require the admission of the prisoner to bail. The right in the court to admit to bail, even in cases of murder, must be conceded. The object of imprisonment previous to trial is not punishment, but the security of the person of the alleged offender to await the judgment of the law. In ordinary cases this object is supposed to be attainable by the exaction of sufficient and reasonable bail. But as a general proposition, in cases of murder, as conviction of the offense results in taking the life of the offender, the temptation to flee from justice is supposed to outweigh all inducements to remain, growing out of pecuniary obligation, no matter to what amount. And often, perhaps generally, though not always, in the case of consciousness of guilt or of probability of conviction, this is so. This probability may naturally be supposed to decrease, though it is not always so, as the efforts to convict prove

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unavailing. Hence, the result of a previous trial is very proper to be considered in determining the probability of a future conviction, and in determining, also, the probability of the prisoner's guilt. It is proper, therefore, to take into consideration all the circumstances ; the circumstances of the transaction, and the legitimate inferences to be derived from them, the evidence and proceedings upon the trial, the disagreement of the jury, the cause and nature of such disagreement, as reflecting probable light on the real character of the offense, and the ultimate result of a new trial.

In this case we start with an indictment against the prisoner, deliberately presented and perseveringly prosecuted, for one of the very highest crimes known to the law. This of itself is usually regarded, before trial, as presumptive evidence of guilt sufficiently strong to justify a refusal to bail. Then we have in the conceded or undenied facts of the transaction not only strong evidence of the act of killing, but that the act was done with premeditation, provided the prisoner was not insane, or under the temporary dominion of a sudden and uncontrollable frenzy. The prisoner having previously provided himself with a pistol, and loaded the same, proceeded to the office of a principal hotel in Albany, and without any previous admonition or conversation or any provocation at the time, other than such as might be supposed to arise from the sight of the alleged destroyer of his domestic peace, shot the deceased instantly dead. I have examined the testimony taken on the trial with the care required by its importance. As I may possibly be required to preside on the trial hereafter to be had, I will not venture to express an opinion upon its legitimate effect. It is not, however, improper to say that the charge of the able and learned judge who presided on that trial (which I have also read with the attention due to the source from which it proceeded), tends strongly to the conclusion that the prisoner is guilty of murder, unless saved therefrom by irresponsibility for his act growing out of mental aberration. This, in substance, must be the main defense on the trial, for whatever sympathy a properly

constituted mind must necessarily and inevitably indulge in reference to the prisoner, growing out of circumstances alleged by popular rumor to be connected with his domestic history, the very existence of these circumstances is a matter of controversy, and, even if true, they probably, so far as I can gather from the case as to the period of their supposed occurrence, can never be legitimately introduced in evidence as, in themselves, an entire and absolute justification for the act of killing, or otherwise than in reference to the effect which a belief in their supposed occurrence produced, or would naturally produce, upon the mind or conduct of the prisoner.

It is true the defense of insanity or insane impulse was not wholly founded upon evidence of this character, but upon a supposed hereditary or family tendency in that direction, and upon a derangement of bodily and mental health and functions occasioned by injuries received and sufferings endured during service in the late war.

But the precise effect of these upon the mind of the prisoner was the subject of grave controversy on the trial, as also was his actual mental condition at the time of the commission of the alleged murder, and immediately previous thereto. In the most favorable aspect of this evidence for the prisoner it may, I think, be said to have left the case not wholly free from doubt. Assuming this to be so, and looking at the clear and unqualified evidence to which I have heretofore referred upon other facts of the case, will not public justice be better subserved and the certainty of the execution of the judgment of the law be more effectually secured by keeping the prisoner in confinement for a short time longer?

The jury on the previous trial disagreed, and this is put forward as a strong reason for bailing the prisoner. The circumstances and mode of their disagreement are sufficiently established. I admit the affidavits of the jurors heretofore conditionally read upon that subject. From them it is apparent that throughout (unless possibly upon the last ballot) six of the jurors were in favor of acquittal, and six in favor of conviction of the crime of murder,

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though the latter were willing to adopt a verdict of manslaughter in the third degree, if it could be made unanimous. The opinions of all these jurors, arrived at after a protracted trial, after great deliberation and under the charge of an enlightened court, are entitled to great respect, but are nevertheless not conclusive. Taking them as they are, they leave the matter in great doubt. If six of them were in favor of acquittal, six of them were also in favor of conviction, and if the result of another trial should, as it may possibly do, support the opinion of the latter, it might well be doubted whether a discretion exercised in favor of bailing the prisoner was judiciously exerted.

As to the probable result of the trial which is hereafter to take place, or as to what its actual result should be, it is unbecoming in me, perhaps, to express an opinion. On the question of bailing the prisoner, that does not seem to me to be precisely the question. It is not precisely whether a second jury is likely to convict, for a jury may be swayed from their duty of conviction or acquittal; nor precisely whether the prisoner is guilty of the offense charged, for a judicial tribunal on such an occasion as this cannot be asked to make so critical an examination of the evidence in the case; nor precisely whether, judging from the mental and moral characteristics of the prisoner, he is likely, notwithstanding the grave character of the accusation, to submit himself, if allowed his freedom, to the judgment of the law, but whether, on the whole, the line of safe precedent is not better followed, and the cause of public justice more securely protected by refusing than accepting bail, by confining than discharging the prisoner—whether the gravity of the accusation is not such, supported as it is by an indictment deliberately found, and by much evidence on a trial already had, as well as by the opinions of six jurors after half a month's protracted investigation, as to make it safer and better on the whole for the general interests of justice and the protection of the whole community, that the defendant should submit to a little longer confinement, which is insepara-

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ble, to a greater or less extent, from all criminal accusations, than that a temptation to escape from the vengeance of the law in a possible contingency should be afforded, and, at the least, a possible misconstruction of an act of judicial discretion should occur.

It is proper to do all in my power to prevent such misconstruction, and therefore to say that while a decision to admit to bail would furnish no just ground for an inference in favor of the acquittal of the prisoner, so a contrary conclusion should not be construed as evincing any opinion of the court in favor of conviction, but simply as a precautionary measure to guard the just rights of the public, while productive of no real detriment to the legal rights of the accused party.

On the whole, after the best consideration I have been able to give to the case, I am of opinion that the application to admit the prisoner to bail should be denied, and that he should be remanded to the custody of the sheriff of the county of Albany.

Order accordingly.

*Explained
57 Barb. 449.
Overruled, 45 N.Y. 654.*

SCHELL *against* THE ERIE RAILROAD COMPANY.

*Supreme Court, First District; General Term, April,
1868.*

JURISDICTION.—INJUNCTION AGAINST PROCEEDING IN
ANOTHER SUIT.

The supreme court, sitting in one of the judicial districts of the State, has no jurisdiction to grant an injunction in an action brought to restrain proceedings in an action pending in another district.

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Where, in an action brought in the supreme court in one district to restrain proceedings in an action already pending in the supreme court in another district, an injunction-order restraining such proceedings is obtained, it is void, and may be disregarded.

Appeal from an order.

This action was brought to settle a complicated controversy relative to the affairs of the Erie Railroad Company, the merits of which are not important to the question of practice determined upon this appeal.

On March 14, 1868, the action having then been pending for some time, an order was made, returnable forthwith, that the defendants show cause why a supplemental complaint should not be filed, and why a receiver should not be appointed of the proceeds of fifty thousand shares of stock, &c. These papers were served on Mr. Skidmore, one of the defendants, and a director of the Erie Railroad Company, in court, and the motion was immediately brought on, and no one appearing to oppose, was granted, and a receiver was appointed.

Previous to the hearing of this motion, a suit had been commenced in another district, upon which an injunction was obtained, restraining, among others, this plaintiff, from proceeding with his action, and from obtaining any appointment of a receiver therein. This injunction was served on Schell on March 18, as appears by the affidavit.

On March 16, 1868, an order was made by Mr. Justice BARNARD, founded on the order of Mr. Justice CLERKE, requiring the Erie Railroad Company to show cause on March 19, before him, why the appointment of March 14 should not then be perfected, and a further order made as to the receiver, and why the order of Justice CLERKE should not be vacated. Upon the return of this order, the order of March 19 was made, declaring that the order of Justice CLERKE should not be held to stay the plaintiff's proceedings; that the motion to vacate the appointment of a receiver should be denied, and that the stay of proceedings in the order of Justice CLERKE should be vacated.

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The judge also gave the plaintiff leave to file a supplemental complaint; ordered the appointment of a receiver, and made other provisions as to security and accounting.

From this order defendants now appealed.

James E. Burrill, D. D. Field, and James T. Brady, for the appellants.

Charles A. Rapallo, and Charles O'Connor, for the respondents.

INGRAHAM, J. (dissenting).—The view I entertain of the proceedings in this case renders an examination of the merits unnecessary on this appeal.

The first order of March 14 does not appear to be relied on, for sustaining the appointment of the receiver. It was made in court on an order issued there and served on a director in court, who was at that time in the custody of the sheriff, and who could not therefore have the opportunity to confer with the officers of the company, or prepare the necessary papers, or adopt any measures to show cause against the application. Such a service cannot be considered a proper service upon the company. When the law provides for serving papers on any officer of a company, it must intend that a reasonable time shall be allowed such officer to place the papers in the possession of those whose duty it is to protect the company from the measures intended to be taken against it. Without such time it is evident that any company may be deprived of its rights and property.

I do not mean to deny that a judge may not, in a proper case, make an order returnable before him forthwith, when the parties are before him and can be then served; but under ordinary circumstances such a course of proceeding is not desirable.

This order, however, was not relied on, and the order of March 16 appears to have been made for the purpose of perfecting the appointment of the receiver then made.

On the return to this order, the order appealed from was made. No objection is made to want of notice on this last motion, and the only difficulty in the way of sustaining it is the order of Mr. Justice CLERKE in the case of the Erie Company and Whitney v. Vanderbilt and others.

This order stayed the plaintiffs' proceedings, and, if it was not properly vacated, all such proceedings were irregular, and should be set aside. The order of Justice BARNARD to show cause why the stay of proceedings should not be vacated, would have been sufficient to justify him in vacating such stay, if the action had been in this district; but there is nothing in that order which warranted the portion of the order of March 19 which denied the motion founded on the order to show cause granted by Mr. Justice CLERKE. No such object was contemplated by the order to show cause of March 16, but only a mere modification of the stay of proceedings therein contained.

The great difficulty, however, lies in the fact that the action in which the injunction was granted was brought in the seventh district. In all actions triable in any other district than the first, the judges of this district have no authority to hear motions within the first district. Section 401 of the code (subd. 4), provides that "motions upon notice must be made within the district in which the action is triable, or in a county adjoining; and no motion upon notice can be made in the first judicial district in an action triable elsewhere." This section forbids the hearing of any such motion in this district in an action pending in the seventh district, and would make the decision on that order a nullity.

Two grounds are relied on to take this out of the above provision. One is, that the order of Justice CLERKE, staying the plaintiffs' proceeding, may be disregarded by the court when the case was before them, and the other that such an order staying proceedings in another action pending in the same court is irregular and without any force. I think neither ground is sufficient. The court may disregard such an order, if, on hearing a cause, it should see fit to do so, although, as between judges of the

same court, such a course of proceeding is not desirable. But the party to the suit is enjoined, and not the court. Such party has no right to apply for any order while the injunction is in force, except to vacate it, and the power to vacate it does not rest with a judge in the first district. He still remains subject to its restraint, and any application by him in violation of it makes his proceeding irregular. Such injunction acts not upon the court, but upon the party (*New York & New Haven Railroad Co. v. Schuyler*, 17 *How. Pr.*, 464).

Even if erroneously granted, the injunction should be obeyed until vacated (*People v. Sturtevant*, 9 *N. Y.* [5 *Seld.*], 263; *Moat v. Holbein*, 2 *Edw.*, 188; *Peck v. York*, 32 *How. Pr.*, 408).

It is also suggested that it was irregular in Judge CLERKE to stay proceedings in another action in the same court. Whether it be so or not, it is not necessary for me to decide. The experience in this litigation shows that it does not tend to a due administration of justice. There would have been no difficulty at first for the defendants to do as they did on this motion now under consideration, to have appealed from the first order that was made, and obtained a stay in the meanwhile. Such a course would have protected all the parties, and avoided much of the confusion which has arisen from conflicting orders obtained from different judges in the same court.

This order having been made while the injunction was in full force in the action brought by Whitney, and that injunction still remaining in force, made the act of the plaintiff in this suit in applying for a receiver irregular, and the order should on that account be reversed.

BY THE COURT.—CARDOZO, J.—The opinion of Mr. Justice INGRAHAM concedes that “the only difficulty in the way of sustaining” the order made by Mr. Justice BARNARD on March 19, “is the order of Mr. Justice CLERKE, in the case of the Erie Railroad Company and *Whitney v. Vanderbilt, &c.* ;” and, therefore, although I have considered the whole case, it will only be necessary

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for me to express my views on this one matter, to show that, in my judgment, the order appealed from should be affirmed.

I am of opinion that the order of Judge CLERKE was absolutely void, and, consequently, that anybody might lawfully disregard it.

The plaintiff in this case brought his action in this court against the Erie Railway Company and others, and obtained an injunction from Mr. Justice BARNARD, in this district. After various proceedings in the action, the Erie Railway Company and Whitney brought a suit against Mr. Schell and others, laying the venue in Steuben county, and obtained from Mr. Justice CLERKE, of this district, an injunction stopping the cause of the plaintiff, restraining the clerk of the court from entering an order made by one of the judges, and not only forbidding the prosecution of this and other suits by this plaintiff and others named, but directing that any other person who might *thereafter* bring an action of the like nature, or intended to accomplish the object sought to be obtained by this suit should, upon notice of that order of injunction, desist and refrain from further prosecuting the same ;—an injunction which, whether considered with reference to the singularity and extent of its provisions, or the circumstance of its being issued by a judge of this district in an action triable in Steuben county, I venture to assert has no precedent in the books. I do not stop to inquire why those who wished to bring an action in Steuben county were not told to go to that district for any preliminary order, instead of having it granted to them by a justice of this district. Certainly that would have been the ordinary course, it having hitherto been considered that the justices in this district had quite enough occupation without interfering in suits triable in other districts, and a departure from the general practice might reasonably provoke remarks and inquiries, which, however, I do not deem it right or worth while to pursue. The real question is, was that injunction a valid exercise of judicial power, or was it a void act.

No such jurisdiction was exercised by the court of chancery in this State in respect to a cause pending in that court. This question was pointedly presented and determined in two cases: *Smith v. American Life Insurance & Trust Co.* (*Clarke*, 307); *Lane v. Clarke* (*Id.*, 309).

In laying down the rule that an injunction would not be granted by the court of chancery to stay a suit in that court, Vice-Chancellor WHITTLESEY, in the case first above mentioned, said: "If a contrary rule should be adopted it would be difficult in some cases to foresee any termination to litigation"—an apprehension which the present extraordinary proceedings show was very well founded.

The vice-chancellor further said, and I cite it to show how unnecessary the course pursued in this case was, and how simple the proper procedure would have been—"This rule will not work any injury. A party, privy or even a stranger to the pending suit, is not without redress. He may apply by petition in the original cause, for such an order as the case made by his petition will entitle him to." Again, in *Lane v. Clarke* (*supra*), the vice-chancellor said: "Proceedings in this court will not be restrained by injunction issuing out of this court upon a new bill, whether filed by a party privy or stranger to the old bill. The only mode is to apply by petition for an order."

The jurisdiction of the court of chancery to restrain proceedings in other courts, acting, of course, upon the parties to the litigation, and not the courts, is undoubted; but that is a very different thing from enjoining the parties from prosecuting the suit in the court of chancery itself. Such an absurdity as, in effect, to enjoin itself, the cases above cited show that the court of chancery in this State would not commit.

The question of the jurisdiction of one court to enjoin proceedings pending in another, arose in the superior court of this city, after the adoption of the constitution of 1846, in the case of *Grant v. Quick* (5 *Sandf.*, 612). Judge DUER said: "The only ground upon which the court of chancery formerly acted in granting an injunction in cases

like the present was the inability of the court of law in which a suit was pending to grant the necessary relief; but as since the code, the jurisdiction of all our courts is equitable as well as legal, or more properly, as the distinction between legal and equitable suits, except in reference to the nature of the relief demanded, is now abolished, the reasons by which the exercise of a power, always invidious, and frequently abused, could alone be justified, have ceased to exist, and have left a case to which the maxim emphatically applies, '*cessante ratione, cessat etiam lex.*'" He proceeds to show that the court of common pleas, in which the action sought to be enjoined was pending, had complete power to give relief to the parties, and then says: "The previous jurisdiction which that court has acquired I have no right and will not attempt to disturb." This case decides that the necessity for the exercise of the right to enjoin a suit in another court having ceased, the law—the jurisdiction—to do so, also ceased. And that case was communicated by Judge DUER to the judges of the supreme court in the first district, to the judges of the court of common pleas, and to the judges of the superior court, at a consultation held by all of them; and unanimously approved. It will be difficult for the courts thus concurring to maintain that jurisdiction exists any longer in one court to enjoin the proceedings in a suit in another court having full power to hear and determine the whole litigation, and to protect the rights of all parties connected with it.

This really disposes of the present case, for there can be no pretense that the supreme court, from the moment Mr. Schell's suit was commenced, had not full jurisdiction; and indeed it is that very jurisdiction which is sought to be invoked by the parties who obtained the injunction from Judge CLERKE.

The constitution of 1846, designing to blend legal and equitable remedies within one jurisdiction, abolished the court of chancery and created one court, termed the supreme court, having general jurisdiction at law and in equity; consisting of many judges, but all constituting but

one court ; and when either judge acts judicially the court acts. In that court Mr. Schell brought his suit against the Erie Railway Company and others, and an injunction which should prevent his appearing at the bar of the only tribunal to which he could apply for relief, would be, as it was aptly termed by the distinguished counsel for the respondents, "a monster in jurisprudence." Everybody interested could, on motion, have been made a party to the suit made by Mr. Schell, and all the relief that any any one was entitled to could have thus been obtained.

The theory that by bringing another suit, and simply laying the venue in a different county, the court could be divided up so as to enable one branch of it to enjoin suitors from proceeding in another branch of it, is entirely inconsistent with the existence of but one court which the constitution created. That court, in the very nature of things, has no power to enjoin a suitor in it from asking to be heard, and every attempt to do so is simply and only void.

The idea that a cause by such manœuvres as have been resorted to here, can be withdrawn from one judge of this court and taken possession of by another ; that thus one judge of the same and no other power can practically prevent his associate from exercising his judicial functions ; that thus a case may be taken from judge to judge whenever one of the parties fears that an unfavorable decision is about to be rendered by the judge who up to that time had sat in the cause ; and that thus a decision of a suit may be constantly, indefinitely postponed at the will of one of the litigants, only deserves to be noticed as being a curiosity in legal tactics—a remarkable exhibition of inventive genius and fertility of expedients to embarrass a suit, which this extraordinarily-conducted litigation has developed.

For these, among other reasons, I think the injunction of Mr. Justice CLERKE absolutely void, and no impediment to the order of Mr. Justice BARNARD.

I have not overlooked the remark of the eminent senior counsel for the appellants, that "the due order of judicial

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proceedings is involved." I really think it is. No one who reviews the proceedings in this litigation, can fail to see that unless the view I have taken of the question be sound, almost endless litigation and inextricable confusion may be created in nearly every case of any importance; and above all, that if judges of the same court, instead of leaving each case to its "due order of proceedings," shall countenance efforts to circumvent and defeat the orders and decisions of each other, the court itself will soon justly forfeit the confidence of the public, fall into disrepute, and its usefulness be seriously impaired, if not wholly destroyed. Such a practice as that disclosed by this litigation, of judges sanctioning attempts to counteract the orders of each other in the progress of a suit, I confess, is new and shocking to me. It had no existence in the practice of the court of which I was recently a member, where the judges are not only gentlemen, having confidence in each other—never ascribing improper motives in judicial action to either of their associates, and never permitting any one to impute such to either before the other—but are scrupulously careful that the conduct of every legal proceeding shall be "due and orderly," and I trust that we have seen the last, in this high tribunal, of such practice as this case has exhibited.

No apprehension, real or fancied, that any judge is about either innocently or willfully, to do a wrong, can palliate, much less justify it. For any such wrong there are abundant means of redress, and to those, unaided by judges in such artifices as have been attempted in these proceedings, every body should be left to resort.

The order appealed from should be affirmed.

BARNARD, P. J., concurred.

Order affirmed.

HAACK *against* FEARING.

New York Superior Court; General Term, October, 1867.

PARTIES.—WHEN MASTER MAY BE SUED FOR ACT OF
SERVANT.

The owner of a pleasure yacht left it in charge of a sailing-master, during his own absence on shore. There were on board the yacht a gun and ammunition, but the owner had given general orders that the gun should not be fired in his absence. While thus left in charge of the yacht, the sailing-master ordered the gun to be fired; and this was done with such negligence as to cause an injury to the plaintiff, for which he sued the owner of the yacht.—*Held*, that the action was not maintainable, and that a ruling of the court on the trial dismissing the complaint, was proper.

The rule that the master is liable for the servant's mismanagement of property intrusted to him by the master was not applicable, because it was no part of the sailing-master's duty to use or discharge the gun, and it was not intrusted to him to be used or discharged in any manner.

Exceptions ordered to be heard at general term.

This action was brought by Peter Haack against Henry S. Fearing, to recover damages for a personal injury sustained under circumstances which are detailed in the opinions given below.

On the trial the justice presiding dismissed the complaint; and from the judgment thereon the plaintiff now appeals.

Mr. Coudert, for the appellant.

Mr. Cadwalader, for the respondent.

BY THE COURT.—ROBERTSON, Ch. J.—This was an action for damages, for a hurt received by the plaintiff, in July, 1866, from the wadding of a cannon negligently discharged on board of a vessel or pleasure yacht (The Ram-

bler) of the defendant, by one of its crew during the absence of the defendant. The signal of the New York Yacht Club was generally used on board of such vessel, which indicated that she belonged to the squadron of that body, but there was no other evidence offered on the trial, of its being so. On the occasion in question the gun was discharged about two or three o'clock in the afternoon of a day in July, 1866, while the vessel in question was being towed by a steamtug to her anchorage near Hoboken, where other yachts were lying. The plaintiff received the injury while on board of a ferryboat, passing between the yacht in question and the shore.

A witness (Smith) testified on the trial that he has not often seen yachts come to their anchorage without firing a salute. It was usual for them to do so. It was customary, but not always done. But he finally said that he knew nothing as to the custom in firing salutes. Some did it and some did not. Another witness (Morrill) only knew of such a custom up to 1859. The vice-commodore of such club squadron (Major), when the accident happened, testified that there was no rule of that club which had any bearing as to firing salutes, and no universal custom by any means of firing guns by yachts while approaching their anchorage; that it was a thing done by some persons and not by others; that yachts sometimes saluted on meeting and sometimes not. He also testified that the firing of salutes did "not come under the scope of the general duty of a sailing-master;" that it did "not come under his supervision unless he had been particularly requested so to do;" there was no duty of his as to firing salutes, except to obey the orders of his superior officer. A rule of the yacht club (No. 14), for setting colors in the morning and lowering them at sunset, when two or more yachts sailed in company or were at anchor in sight of each other, was the only one as to firing guns. It prescribed that in such case the time for so hoisting or lowering colors should be taken from the senior officer in command, and that no guns should "be fired in setting or hauling down the colors, except by the yacht giving the time." This was all the

evidence on the trial as to the duty or any custom of firing guns on anchoring or meeting another yacht, or on any other occasion.

The mate of the yacht in question (Hoffman), who was examined as a witness for the plaintiff on the trial, testified that when the gun was fired he was getting the anchor ready, to drop it. That two years previously (being shortly after the yacht was built), because a man had been hurt by discharging such gun, the defendant gave general strict orders to all the crew not to fire any guns unless he was on board ; and again in the previous summer at New London, such orders were known to all on board of the boat. They had fired such a gun a dozen times when approaching such anchorage while the defendant was on board ; they sometimes fired it and sometimes not ; they fired it off once or twice without the knowledge of the defendant. He was not on board at the time of the accident in question. This witness testified that he supposed the gun was fired to salute the yacht Wave, and not the tug-boat which blew its whistle ; and that they had orders not to use any wadding in firing guns. The plaintiff was injured by the wadding.

On the trial the defendant's counsel moved to dismiss the complaint, which motion was granted ; and the exceptions taken thereto, and those taken on the trial, were ordered to be heard, in the first instance, at general term.

I have not been able to find any evidence in this case that the gun, the discharge of which caused the injury to the plaintiff, was fired in the course of any employment or duty of the master of the vessel in question. It was not necessary in the course of its navigation, or as a matter of duty to other vessels, or in compliance with any custom governing vessels in general in New York harbor, or yachts belonging to the New York Yacht Club Squadron, if the vessel in question belonged to that squadron, or was bound by the rules of that club, of which there does not seem to have been sufficient evidence. So that the ground of the defendant's liability is reduced to the question, whether,

by merely permitting the master of the vessel to have the possession and custody of the gun and ammunition with other equipments of the vessel, the defendant became responsible for their careless use.

In the case of *Lambt v. Lady Polk* (9 *Carr. & P.*, 629), the defendant was held not liable for the negligence of her coachman, who, after descending from his box, had, in turning aside the head of a horse harnessed to a van which obstructed his passage, precipitated a box of mineral waters from such van upon the shafts of the plaintiff's gig and broke them, because the act was not done in the course of the coachman's employment for the defendant.

In the case of *Mitchell v. Crassweller* (13 *Com. B.*, 237, 16 *Eng. L. & Eq.*, 448) it was held that for an injury done by the negligence of the defendant's carman to a third person, in driving his employer's horse and cart, for his own private purpose, after the time when he should have, and usually did, put up such horse and cart in their stable, the employer is not responsible.

In the cases of *Joel v. Morrison* (6 *Carr. & P.*, 501), and *Sleath v. Wilson* (9 *Id.*, 607), it was conceded that if a servant drives for his own purposes his master's carriage, without leave, during the time it is not in use for the business of the latter, the master is not liable for any injury caused by its means, while so driven, although, in both, it was held that if, while driving for his master's business, the servant merely makes a detour for his own purposes, his master is responsible for his negligent driving during such deviation. That distinction is made in both cases to rest on the fact that, in the latter event, the master has enabled the servant to do the injury, by the mismanagement of the carriage while intrusted with its use for the master's benefit.

That doctrine would apply in this case, if the sailing-master had injured a person or vessel by careless navigation of the vessel under his charge. But the mere possession and control of the gun and ammunition could not create or imply permission, much less authority or duty, to use them in the face of the positive orders of the defen-

dant to the contrary. It could not be any part of the duty of sailing or taking charge of the vessel to discharge signal guns or give salutes; and there was no evidence of a uniform custom on the part of the vessel in question, or of any other yachts, or of any regulation to that effect in the squadron to which it was supposed to belong, to make this a part of the ordinary employment of the sailing-master.

I apprehend there is no difficulty in a general limitation of the extent of the employment of a servant, by agreement or command, so as to prevent him from doing acts of a particular character. It is true that the prohibition of specific acts within the scope of a general employment on a particular occasion only, or of a particular mode of doing them, may not exempt the employer from liability. But prohibiting their being ever done must certainly curtail the extent of the employment; and the language of Justice STORY (*Agency*, 452), in declaring the liability of a principal, notwithstanding his prohibition of the acts of his agent, by which third parties are injured, must be construed in that sense. The case of the Philadelphia & Reading R. Co. v. Derby (14 *How. U. S.*, 295), also can only extend that far, otherwise it is contrary to several of the very cases cited in the opinion then delivered.

I am not aware of any principle which justifies the use by a party of a prior written statement of a witness of such party, to instruct him what to say, under pretext of refreshing his memory, when he has not shown any weakness of recollection. The case of *Guy v. Mead* (22 *N. Y.*, 462), cited for the purpose, does not sustain any such proposition; and the attempt to do it on the trial was properly prevented. I do not understand the question put to a witness as to the extent of the orders given by the defendant as calling for his construction of their language, but his recollection of it. He had not previously undertaken to give their precise words. It was therefore properly admitted.

There being no error committed on the trial, the exceptions should be overruled, and judgment given for the

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defendant, dismissing the complaint on the merits with costs.

MONELL, J., concurred.

MCCUNN, J., dissenting.—I regret I must dissent in this case. On the 30th of July, 1866, as the yacht *Rambler* of the New York Yacht Squadron was about to drop anchor at her rendezvous in the waters of the Hudson, she fired a salute of one gun to the other yachts of the squadron. The wadding of the gun struck and penetrated the side of the ferryboat, on which plaintiff was sitting, knocking him down, breaking his arm, and rendering it useless for life. This action is brought against the defendant, the owner of the yacht, to recover compensation for the injury.

It appeared in evidence, that, in the harbor of New London and in the harbor of Newport, two years previous to the accident, instructions were given by Mr. Fearing, the owner, that no firing should take place on board his yacht, unless he was present, or unless he ordered it to be done; that on the morning of the accident, Mr. Fearing quitted his yacht at Staten Island, and left her in command of a person named Smith, whom he called his sailing-master, and directed Smith to proceed to the rendezvous; and that Smith, on arriving at such rendezvous, ordered the customary salute to the other yachts, without receiving instructions from Mr. Fearing. On this state of facts, a nonsuit was ordered by the learned judge below, on the ground that "plaintiff had shown no facts to render the defendant liable." I am clearly of opinion that error was committed in granting such nonsuit.

On the trial of the action, an effort was made on the part of the defendant to establish the fact that the witness Smith was not the captain, but the sailing-master of the yacht. This is of little consequence; indeed, it is quite immaterial whether Smith was known as captain or as sailing-master. It is admitted that when Mr. Fearing quitted his yacht at Staten Island, he placed Smith in the entire command of the ship, and that she was absolutely

under his supreme control ; and I hold that Mr. Fearing, the defendant, under the circumstances, is liable for the act of Smith in negligently firing the gun. It is a sound maxim in law that, when a party is injured by the negligence of another, the person causing the injury shall be held strictly accountable, unless the party injured contributed to the accident, which was not the case here. There is no pretense that plaintiff was in the slightest degree negligent. On the contrary, he was sitting in the cabin of the ferryboat, on his way from New York to his home in Hoboken, when this shot plunged through the side of the boat and caused the injury, which has invalidated him for life. Surely, if courts are intended to afford a remedy for gross negligence, there never was a case in which the refinements of the law should be brought to bear by the judges to enforce such remedy more than in this case. The plaintiff had been attending his daily toil, and was returning to his family, secure, as he thought, in all things which render life safe, when this defendant's servants, after returning from a trip of pleasure, in the most negligent and careless manner, did an act which resulted in the injury. A glance at the evidence must convince an ordinary mind that it was not only carelessness, but carelessness of the grossest kind. The act of Master Smith in firing the gun was within the strict line of his duty, and the defendant, Fearing, by placing Smith in command of his yacht and in the possession of the implements to do wrong, rendered himself liable ; for I lay it down as a broad, general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must suffer. In treating the question herein we are compelled to withdraw ourselves from the ordinary method of looking into such cases, because the facts and circumstances are not altogether within the scope of ordinary business transactions. For instance, this was a pleasure yacht ; she was the means adopted by her opulent proprietor to gratify his tastes ; and all those amenities and civilities which can by possibility pass between gentlemen able to afford such lux-

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uries, are expected to be exchanged—such as salutations by displaying flags, firing guns, and exchanging other courtesies, and which, I hold, become a part and parcel of the duties of the yacht crew. The vice-commodore of the squadron testifies, “that the salute to the flag (the one causing the injury) was in accordance with the rules of the club,” and the club rules declare such amenities and civilities to be a part of their duties; if such civilities are not part of the ordinary duties of a pleasure yacht and her crew, then it is hard, indeed, to say what their legitimate duties are; they do not engage in commerce, they do not contribute to the welfare or happiness of the community in general, but to the pleasures of the few who associate together; and their polite courtesies to each other I hold, is part of their legitimate business; and, when they commit an error or a wrong, in carrying out these pleasures, upon one of the community, they should be held strictly accountable. Once, at Newport, in firing a salute from the same yacht, a similar accident occurred, and then it was admitted that Smith was acting within the limits of his duties, and it was because Mr. Fearing believed that the firing at Newport was part of the duties of his crew that he forbade firing thereafter, unless he was on board, or gave special directions to do so. Indeed, the fact that the firing was specially prohibited, unless at certain times, is the strongest evidence that it was within the ordinary bounds of the crew’s duty, else why prohibit it? Smith had been the commander and sailing-master of the yacht for years past, and he knew well what his duties were, and if the firing had not been a part of his duties, even without instructions from Fearing, it must be presumed he would not have fired the gun. But it is manifest that it was because he believed he was performing his duties that he tendered this salute to the squadron. It must, therefore, be taken for granted that the act of Smith, whereby the accident occurred, was strictly within the line of his duties, notwithstanding he was forbidden to perform it; and it is an elementary principle that you cannot bind innocent and third parties who have been injured,

by proving private instructions to servants not to perform certain acts, ordinarily performed within the line of their duties.

After having said thus much as to what their legitimate duties are, let us see whether Mr. Fearing would not be held liable for acts done by his commander, which injure others, even if those acts had been some two years before prohibited. Suppose Captain Fearing to be on board his yacht, his sailing-master, Smith, in command of the vessel, the wind abeam; and another vessel is seen approaching in directly the opposite course, having the wind also on her beam, and the ships are meeting end on, and Captain Fearing gives the command to put the helm to port, which is the proper command, the other vessel having received the like command, and, instead of putting the helm hard to port, Smith, the sailing-master, in the face of Mr. Fearing's command, puts his helm hard a-starboard, and a collision takes place; Mr. Fearing or his vessel would certainly be held liable for the injury to the other vessel, because article 2 of an act fixing rules and regulations for preventing collisions on water, passed April, 1864 (and which, by the way, is now the sailing regulation of all the world), declares "if two sailing vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Now, this is the aptest kind of an illustration; and if Mr. Fearing had been absent from his vessel, and the sailing-master had, after receiving positive instructions from Mr. Fearing to obey the law in relation to putting his helm to port, instead of putting his helm to port, put it hard to starboard, thereby causing the collision, surely the absence of Mr. Fearing would not have exonerated his vessel or himself from liability, more than if he had been on board; and certainly the law will hold Mr. Fearing strictly liable for the acts of his sailing-master in firing this gun improperly, as much as it would for the act of such sailing-master in disobeying his orders, as I have illustrated above.

I might stop here without citing a single authority, be-
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cause I hold that judges are not bound to treat the law as a thing of words, dates, readings, and decisions, but as a living fact, in close relation to other living facts, and having in itself the germs of growth and change; and I would be justified in saying, without adding another word, that the judgment below should be reversed, and a new trial ordered; but let us see what some of the most eminent elementary writers and some of the ablest decisions say upon this question. One of the earliest cases in the books, and one directly in point, is to be found in the first volume of decisions of Lord MANSFIELD, by *Evans*, p. 98. That was the case of the capture of a ship by the enemy, where it was agreed between the captors and the captain of the captured ship that one of the sailors should be retained as a hostage until the ransom fixed by the captain with the enemy for the ship should be paid. The sailor consented to be retained or imprisoned by the enemy, provided that the owners of the captured ship would, during his captivity, pay his regular wages, which was agreed to by the captain. The captain brought the ship home, but the agreement on his part with the captors was repudiated by the owners, and the ship was sold for the benefit of the captors. After the seaman obtained his liberty he returned and sued the owners for his wages during his imprisonment. The answer set up was, that the captain had no authority to bind the owners in such a case, and that his doing so was illegal and entirely without the line of his duties, and contrary to the statute law of England. Lord MANSFIELD, delivering the opinion of the court, held that, although it was not within the strict line of his ordinary duties, and although the law forbade the captain doing so, yet, as the captain believed he was doing his duty when ransoming the ship, and upon principle, he should recover. And this decision was coincided in by all the legal minds of the day. Now, there was an unlawful act perpetrated by the captain, an act forbidden by his owners and by the law of the land, and one which might be considered entirely beyond the line of his duty; and yet, because the sailor was injured by detention, and because the captain had it

in his power so to stipulate, it was held that he could recover.

The next case of any moment we find in the English books is that of *Sleath v. Wilson* (9 *Carr. & P.*, 612), decided by Lord ERSKINE, wherein that able jurist held "that whenever the master intrusted the servant with the control of the horses and carriage, it is no answer that the servant acted improperly in the management of it." "If it were," proceeds that learned judge, "it might be contended that, if a master directs his servant to drive slowly, and if the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable; but (says Lord ERSKINE), that is not the law; the master in such a case will be liable, and the ground is, that he has put it in his servant's power to mismanage the carriage by intrusting it with him;" and he therefore held that defendant should be held liable.

Now, the case at bar and the one last cited are very similar, notwithstanding the fact that the instruments working the injury were very dissimilar, the one being a servant and a pair of horses, the other being a servant and yacht. Both disobeyed the instructions of their masters, and both thereby caused injury to the plaintiffs in the different actions. One disobeyed his master's directions in taking the horses back to their stables out of their usual way, to perform errands of his own; the other, when taking the yacht, at his master's request, to her usual rendezvous, fired a salute which he was not instructed to fire, thereby causing the injury. The principles involved are precisely similar, and the ruling in the one case should govern the ruling of the other.

The rule that the master shall be liable for the tortious acts of his servant, is of universal application. The maxim is "*respondeat superior*." If the act be done in the course of his employment, the master is liable, even if he forbade the act to be done. Such was the decision of Mr. Justice GRIER in the case of *Derby v. Philadelphia & Reading R. R. Company* (14 *How. U. S.*, 483), where the question came fairly up, and where the doctrine I contend

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for was revived and reaffirmed in the most explicit terms. Derby had sued the company for injuries to his person; the locomotive causing the injury was run by an engineer employed by the road, who had express instructions not to run his engine on the road that day. Contrary to such instructions, he ran his engine, and in doing so injured plaintiff, and the company was held liable. Now the case of Derby is precisely similar to the one at bar; there the engineer was on that day expressly forbidden to run his engine on the track: he did run her, and caused the injury, and the company was held liable; here the sailing-master had received instructions two years previous not to fire salutations without permission; while in his master's employ, in bringing up the yacht to her place of destination, he did fire one which caused the injury, and his employer should be held liable.

In some of the cases cited on the defendant's points, and in others not on his points, there are to be found dicta, which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the servant act in disobedience of his orders; but it will be seen on a careful examination that the question depended on whether he was or was not, at the time, in the relation of master and servant; and I know that in some of those cases some subtle and astute distinctions are drawn as to when the servant is acting in his master's employ; yet I can find no case contrary to the views expressed above. The elementary writers all agree that the master is liable for the acts of his servant, although those acts may be contrary to his orders. Judge STORY, in his treatise on Agency, says that the master must be held liable in civil suits for "the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasance or malfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of, such misconduct, or even if he forbade the acts. Chancellor KENT, in his Commentaries, holds the same rule; and both of these emi-

nent writer cites a large number of authorities in support of their views (*Story Ag.*, 537, notes 1, 2 and 3).

It cannot be said in this case that Smith was not acting in the line of his duty when he fired the gun : he was. He was bringing the yacht to the place where his master directed him to bring her ; he was in sole command, and was manœuvering her, exchanging courtesies and salutations with other vessels, all of which was in the strict line of his duty. One act of his duty he was directed, two years before, to omit ; he did not omit, but committed the act, and did it so negligently that he injured others. Now, as I said before, all wrongs have remedies in law, and, pray, where is the remedy here ? Who is to compensate this innocent man for the great injury and wrong he has suffered, without the slightest negligence on his part ? Not the Ferry Company, who were carrying him to his home, and who did not contribute to the negligence. It is idle to answer that the plaintiff may have recourse to Smith, when the law gives him the option to sue either the master or the servant. Smith's responsibility is not so apparent as that of the owner of the yacht ; but, however that may be, the plaintiff in the exercise of an election accorded him by the law, has chosen to come against the principal. Instead of turning the plaintiff round to Smith, the defendant, as principal, may seek indemnity for any damages he may sustain in this action, by a suit against his agent for disobedience of his instructions.

The judgment should be reversed, and a new trial ordered.

Judgment for defendant on the exceptions.

GREATON *against* GRIFFIN.

Supreme Court, Second District; Special Term, August, 1868.

INJUNCTION.—CONSTITUTIONALITY OF LOCAL LAWS.—ADVERTISING FOR MUNICIPAL CONTRACTS.

It seems, that an owner of a city lot cannot maintain an action to restrain the paving of the street in front thereof; at least, upon a complaint which does not aver that any invasion of the plaintiff's property is attempted or threatened, or that plaintiff will be unlawfully subjected to a tax or assessment for the expense of the improvement.

The courts can restrain commissioners authorized to make a street improvement, from committing any abuse of their trust; but cannot inquire into the motives which induced the legislature to confer the power, or the expediency of conferring it.

A private or local bill is not necessarily unconstitutional because its title is needlessly particular in stating details embraced by the act; or because the title names several things as embraced.

Commissioners appointed by the legislature to lay a pavement within a city are not officers of the city, such as (under the constitution of 1846, art. 10) must be elected by electors thereof.

Where a statute authorizes public officers to use an article which in fact is patented, in the construction of a public work, the legislature must be presumed to have known the rights of the patentee; and any provisions in the act requiring the officers to advertise for proposals and employ the lowest bidder, must be construed so as to preserve and not defeat the authority conferred.

Motion to dissolve an injunction.

This action was brought by Jane A. Greaton against Thomas W. Griffin and others, to restrain them from proceeding in execution of authority conferred on them by the legislature to lay a pavement in the city of Brooklyn.

A preliminary injunction was granted, which the defendants now moved to dissolve.

Van Cott, Winslow & Van Cott, and Henry C. Murphy, for the motion.

Pratt, Bergen & De Witt, opposed.

GILBERT, J.—The plaintiff has brought this suit to prevent the execution of an act of the legislature providing for the repavement of Union-street. She alleges that she is the owner of a lot on the southerly side of said street one hundred feet west of Smith-street; that the defendants, who are named in said act as commissioners for the purpose of carrying into effect the provisions thereof, have made a contract with the Nicolson Pavement Company for the laying down of said pavement; that the said work has been begun by tearing up the carriage way of said street, at or near Court-street, thereby rendering said street unsafe for travel; that the defendants threaten to lay down said pavement on said street at all hazards; that she is advised and believes the said act of the legislature is unconstitutional and void; that she will be put to great trouble and expense if the defendants shall not be restrained from doing said work; and she prays for an injunction accordingly.

It struck me upon argument that the plaintiff had not shown such an interest in the controversy as would entitle her to maintain this suit. The complaint contained no averment of any invasion or attempted invasion of the plaintiff's property, nor does it even show that she may be subjected to the payment of a tax or assessment to defray the expenses of such a work. On the contrary, the expense of such work is, by the express provisions of said act, required to be levied and collected upon property within a district of assessment which is to be hereafter prescribed by the common council of the city of Brooklyn. I am unable to see any ground upon which the plaintiff can maintain this suit. But this point was not raised on the argument, and I will not further advert to it than to refer to what I consider a sound principle on this subject, as laid down by the court of appeals in the case of *Doolittle v. Supervisors of Broome County* (18 N. Y., 155).

A temporary injunction having been granted, a motion was made to dissolve the same, and upon the argument of that motion, the plaintiff sought to show by affidavits that the said commissioners erred in adopting the said Nicolson pavement; that it was inferior to the other pavements; that the contract price to be paid therefor was excessive and exorbitant; that a majority of property owners on the line of the said street were opposed to said pavement, and that the passage of the act authorizing said work was procured by fraudulent and corrupt means. The act provides that said street "shall be paved with stone blocks known as Belgian pavement, or with other improved pavement, at the option of the commissioners." The court could, undoubtedly, afford a remedy for any abuse of the trust thus reposed in the commissioners, and preliminarily restrain the commission of it; but upon a careful examination of the evidence on both sides, I can find no warrant for interposition upon that ground. With regard to the comparative merits of the respective pavements, the selection by the commission of the Nicolson pavement, the motives or inducements which actuated the legislature in enacting the law, and the inexpediency of that kind of legislation in general, or of the particular act under consideration, it is sufficient to say that the court has nothing to do with such questions, and has no power to afford relief against the consequences, if they exist, of unwise or corrupt legislation. The only remedy for injustice or oppression of that kind is to turn the authors of it out of office, and to put better men in their places.

The act provides that the expenses of the work shall be levied and collected in the same manner as is now provided by law with reference to grading and paving streets in Brooklyn. Such provision of law is contained in the charter of the city of Brooklyn, and requires the common council of said city to fix the districts of assessment, and to advertise for remonstrances against the same, before ordering the paving of a street. The plaintiff's counsel contend that the commissioners cannot proceed with the work until the common council shall have fixed the dis-

tricts of assessment. The act under which they are acting is mandatory, and requires the street to be paved, without reference to any action of the common council. The provision of the charter referred to is a restriction merely upon the powers of the common council to order an improvement, and has no relation to the manner of raising money to defray the expense thereof after it shall have been ordered. The act in question supersedes, by its own provision, all action of the common council before ordering work to be done, and adopts merely the proceedings prescribed by the charter for the levying and collecting of the assessment for work after the same shall have been duly ordered by the common council.

The remaining and important questions are : 1. Whether the act is valid ; 2. Whether the contract made is such as the commissioners were authorized to make.

The plaintiff contends that the act is invalid because it is in conflict with that provision of the constitution which requires that a private or local bill shall embrace only one subject, and that that shall be expressed in the title. I think it very clear that the act in question embraces only one subject, and that that is sufficiently expressed. If the title had been "An act in relation to certain streets of Brooklyn," it would not probably have been urged that it infringed the constitutional requirement on this subject. I think it is not a reasonable objection that the title is unnecessarily particular. Nor does the meaning of several things in the title make it embrace more than one subject. Whether in fact it does or not can be determined only by reading of the act itself, and not by that which the title expresses (*People v. Lawrence*, 36 *Barb.*, 176).

The plaintiff also contends that the act is in violation of article 10 of the constitution,—which requires all the city officers whose election or appointment is not thereby provided for to be elected by the electors of said cities or of some division thereof as the legislature shall designate for such purpose. The point of the argument on the part of the plaintiff is that before the adoption of the constitution the city of Brooklyn existed as a municipal corporation : that

one of the officers of such city was the street commissioner; that the common council was, by the charter thereof, empowered to prescribe his powers and duties; that they executed such power, and conferred upon the street commissioner authority to advertise for estimates and to contract for the paving, &c., of streets. And it is said that the commissioners under the act in question being thereby authorized to perform some of the functions of the street commissioners of the city of Brooklyn, are city officers, and must be elected or appointed pursuant to the section of the constitution cited. I think this position cannot be sustained. The commissioners are neither city officers nor even agents of the city (*King v. City of Brooklyn*, 42 *Barb.*, 627). They constitute no part of the organic government of the city, but are mere agents of the state, appointed by the legislature to do a specific act; and their functions cease with the performance of that act. The provision of the constitution relates only to persons who, by virtue of their office, are intrusted with the performance of permanent functions of the city government. A person intrusted with the performance of a particular duty within the territorial limits of a city, or which affects only the interests of the citizens thereof, is not necessarily a city officer. The test is whether his office constitutes a part of the government of the city as organized by the act incorporating it. These commissioners are to exercise certain powers which have heretofore been vested in the common council of the city of Brooklyn, to be administered through the street commissioner, acting under their direction and as their corporate agent. There can be no doubt of the power of the legislature to transfer to a new board a portion of the administrative functions of the common council (*People v. Pinckney*, 32 *N. Y.*, 306). The legislature can repeal, alter or amend the charter. Under this power they could annihilate the office of street commissioner, and create a board of public officers to perform all the functions heretofore vested in him. The act in question is clearly within the exercise of this power. The case cited by the plaintiff's counsel, which he deems opposed to this view,

merely holds that a change of the name of the office, or an addition to the functions thereof, affords no warrant for a change of the constitutional mode of election or appointment. But such cases have no application to the question under consideration. To sum up the whole matter on this head, the commissioners named in the act under consideration are not city officers within the meaning of the provision of the constitution referred to, nor are they agents created by law to accomplish a specific public object; and if they can be deemed officers at all they are officers whose offices have been created since the adoption of the constitution, and it was competent for the legislature to direct the mode of their appointment (*People v. Draper*, 15 *N. Y.*, 532; *People v. Pinckney*, *supra*; *People v. Acton*, 48 *Barb.*, 524; *Litchfield v. Macomber*, *Id.*, 299.)

The only remaining objection raised by the counsel for the plaintiff is that the commissioners have violated that provision of the act which requires the contract to be made with the lowest bidder. The act provides that said street shall be paved with stone blocks known as Belgian pavement, or with wooden blocks known as Nicolson pavement, or with other improved pavement, or part with each kind, at the option of said commissioners. Contracts for furnishing material and performing the work provided for by this act shall be given out upon ten days' notice, &c., to the party or parties who shall appear to do the same at the lowest price, &c., &c. In the case of *Dean v. Scranton* (7 *Am. Law Reg.*, 564), the supreme court of Wisconsin decided that where a city charter required that all work should be let by contract to the lowest bidder, the city authorities could not contract at all for laying the Nicolson pavement—the right to lay it being a patent right and owned by a single firm, and the work being therefore one which could not be open to competition. This decision has been followed by this court, sitting in the first district, in the case of *Dolan v. The Mayor*. Without expressing any opinion as to the correctness of these decisions, I am clearly of opinion that they do not apply to this case, for the reason that the act under consideration expressly au-

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thorizes the use of the Nicolson pavement, and the legislature are legally presumed to have known at the time of the passage of the act, that it was a patented article and might not therefore be subject of competition. The subsequent provisions, therefore, requiring the commissioners to invite competition, must receive such a construction as will preserve and not annul the authority so conferred upon the commissioners (*Harlem Gaslight Company v. The Mayor*, 33 *N. Y.*, 309). In this view such provision cannot be deemed a restriction of the authority of the commissioners, but is merely a regulation of the mode of discharging their duty in obtaining proposals for doing that work.

The motion to dissolve the injunction must therefore be granted with ten \$10 costs.

TOLANO *against* THE NATIONAL STEAM NAVIGATION COMPANY.

New York Superior Court ; General Term, January, 1868.

ACTION FOR CONVERSION.—PLEADING.—ACTION AGAINST CARRIERS.

Under a complaint charging the defendants with a *conversion* of the plaintiff's property to their own use, the plaintiff can only recover upon proof of an absolute appropriation of it by defendants to their own use ; or upon proof of what is equivalent—a parting with it to another without authority from the owner. Proof that defendant received the property as a common carrier and has negligently lost or failed to deliver it, will not sustain a recovery.

What is a sufficient evidence of a compulsory appropriation by defendant, sufficient to sustain such a complaint,—considered, in a particular case.

• Appeal from a judgment upon a verdict.

Mr. Van Cott, for the appellant.

Mr. Morrison, for the respondent.

BY THE COURT—ROBERTSON, Ch. J.—The cause of action set out in the complaint in this case is a wrongful conversion by the defendants of, and a refusal by them to deliver to the plaintiff, on a demand by her, a trunk (her property) “containing plate and other valuable articles, and money.” Were it not that evidence seems to have been admitted without objection of the value of such *contents*, and the case to have been tried upon the assumption that the action was brought for *their* conversion also, it might be doubtful whether *they* could be recovered for under a complaint so worded.

Under the allegation in the complaint of the “conversion” of the property in question by the defendants, to their own use, whether as bailees for hire, or only gratuitous custodians of it, the plaintiff could not recover without proof of an absolute appropriation of it by the defendants to their own use, or what is equivalent, parting with it to others without the authority of the owners. Only in such cases would an action in the form of *trover* have formerly lain, even against common carriers (*Devereaux v. Barclay*, 2 *Barn. & Ald.*, 702; *Stephens v. Hart*, 4 *Bing.*, 476; *Youl v. Harbottle*, *Peake Cas.*, 49; *Sublock v. Inglis*, 1 *Stark*, 154).

In a case where a common carrier might have been sought to be made liable, on non-delivery, a special action in the case in a breach of the public duty of carrying safely, or of *assumpsit* for a breach of the undertaking so to carry, would have been the only forms of remedy for a mere negligent loss (*Ross v. Johnson*, 5 *Burr*, 2825; *Anon.*, 2 *Salk.*, 665). This constitutes a substantial difference in the cause of action, which the plaintiff was bound to observe in the statement of facts contained in the complaint (*Code of Pro.*, § 142, subd. 2), if she sought to recover for mere non-delivery or loss. This, in effect, the plaintiff conceded; claiming on the argument, however, that such ap-

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propriation, in fact, by the defendants, was established by the evidence.

No question is made as to the termination by the compulsory transfer of the plaintiff to the receiving or hospitalship Illinois, under the health laws of this State, of the original contract of the defendants, as common carriers, to transport the plaintiff and her baggage to the port of New York, and safely land it and her there; the plaintiff's counsel, not only conceding that it was so terminated, but even claiming that the defendants never had, even during the voyage, the missing property under their charge as carriers, and they took it from her by compulsion, and against her will, into their custody, and kept it in such a manner that it could not have been lost or stolen, and must, therefore, have been appropriated by them to their own use. A mere compulsory taking of the property from the plaintiff's possession by the defendants, and a refusal to restore it, would have been sufficient without any proof of its subsequent fate, or of a demand to enable her to recover in this action. Proof of want of ordinary care in keeping it, or of actual subsequent appropriation of it to the use of the defendants, would only be necessary in case they had been voluntary bailees without hire.

On the trial, the counsel for the defendants requested the court to charge the jury that they "must find a verdict for the defendants if they found that they did not convert the property in question to their own use," which the learned judge presiding on the trial refused to do, except as he had already charged, to which refusal such counsel excepted.

The learned judge has charged that "the principles applicable to all cases of property lost by carriers are equally applicable to this case, and must be applied with the same rigor as in all others. There is nothing that calls for any relaxation of the rules in this case." And he added, "In my view of the case under the evidence, these defendants are liable for the loss of this trunk. As to the liability for the contents, that is another thing. There is no question at all but that there was such

a trunk, and it may be fairly assumed that the trunk was lost." He then submitted to the jury substantially three questions of fact. (1.) What were the contents of such trunk. (2.) Whether the articles of wearing apparel and jewelry claimed by the plaintiff to have been in said trunk when lost were her ordinary and necessary wearing apparel for the voyage; and (3.) Whether the sum of \$1,200, claimed by her to have been in such trunk when lost, was a reasonable amount of money "for traveling expenses and for staying a few days at a hotel until she could get into business," and instructed them that if they decided the last two questions in favor of the defendants, they should "give her a verdict" for such articles as were in the trunk, except certain ones which he had directed them to disregard as not being necessary either as wearing apparel or for traveling expenses.

The court thus not only evidently put the liability of the defendants upon the ground of their being common carriers, liable at all events for the loss of the property in question upon its non-delivery, and not exempt from liability by proof of any ordinary legally recognized excuse for not delivering at the end of the route, but also refused to charge that the defendants were not liable, unless for a conversion of the property to their own use. This is directly contrary to the principles settled by the authorities already referred to (*vide supra*), and was sufficient error to authorize the granting of a new trial. The plaintiff's counsel seems, however, to have conceded this, and devoted himself to the task of proving that there was sufficient evidence in the case to establish such conversion, either by the compulsory taking of such property out of the possession of the plaintiff; or if such taking were peaceable and lawful, by the impossibility or violent improbability of its disappearance in any other way, under all the circumstances of the case. And as it may be necessary, in case of another trial of this case, to determine what rules of law are applicable under that view, it may be well to look at the evidence.

It was not only conceded on the argument, but claimed

by the plaintiff's counsel, "that the defendants at no time, as carriers or in any other way, by contract with, or privity or consent of the plaintiff, had charge of the property." This may be assumed to be true up to the time of her leaving the Illinois to go on shore, for both the plaintiff and another witness (Mrs. Young) testified to that effect. The former states that she had had charge of that box during the passage in her "berth," because there were valuable things in it, and "she never allowed it to go out of 'her' possession on board the Helvetia or the Illinois until it was put on the tugboat;" and again, that this was the only package in her charge—she had no other but that in her charge. She further testified that she had it three weeks in her room in the Illinois. The other witness corroborated her statement as to having it in her charge in her berth during the whole voyage on board of the Helvetia. And the assumption of that care by the plaintiff would have prevented any recovery by her for any loss of such box during the voyage (*Cohen v. Frank*, 2 *Duer*, 335).

The first question, therefore, on the evidence, is as to the compulsory taking of such property by the defendants out of the possession of the plaintiff. In applying the evidence to that point, it is to be assumed that all previous relations between the parties had ceased, and that they stood precisely as if the plaintiff, being a lodger on board of the Illinois, had for the first time parted with the possession of her trunk at the moment of her leaving that vessel to go on shore, by letting it go on board of a separate tugboat from that in which she went to the shore. The testimony of the plaintiff was, that when the tugboat came alongside, and she was directed to go on board of it to go ashore, her son and herself took such trunk and its contents "to the gangway to bring with them." Mr. Finlay (the alleged agent of the company) said, they could not bring their baggage on that boat—it must go on the other tugboat. "They then carried it across to the side to the other tugboat, and it was put on board." They then went ashore on the first boat. This was all done under Mr. Finlay's direction. On cross-examination, she stated that

he "said he would not allow any package to be on board where the passengers were." This was corroborated by Mrs. Young and the son of the plaintiff (James Tolano). The latter also testifies that Mr. Finlay, who was acting then as agent of the defendants, receiving and delivering letters, bringing down provisions and the like, came down with two tugs to bring the passengers and baggage on shore. The fact of Finlay's acting as such agent was also testified to by another witness (Gamble), who further states that Finlay brought all the baggage on one tug, and carried the passengers to land on another. After towing the Illinois to her winter quarters by such boats, he removed the passengers on one boat and the baggage on another. He ordered no baggage or package to be taken by the passengers. This was when all were leaving the Illinois to land. He would not permit any of the passengers to have or keep their baggage under their own charge when landing from the Helvetia. "He prevented them from taking their baggage with them." It was admitted on the trial "that the defendants employed the tugboats to land the passengers and their baggage." This evidence was not essentially varied by any other testimony, except that Mr. Finley testified that he told the passengers that they had to go on the passenger tugboat, and the baggage must go by the other tug, but that any small parcels or valuables he would allow them to take with them; and in this he was corroborated by two other witnesses (Rourke and Peterson). This testimony is apparently not contradicted by any other. The box itself was three feet long and one foot six inches broad. Mr. Finlay also testified that he had the superintendence of the landing of the passengers and baggage from the Helvetia. He took down two boats—one for the passengers, and the other for baggage. He had orders from the quarantine commissioners to have the Illinois brought to Gravesend Bay, and there disembark the passengers and the baggage. He wanted to get the passengers to Castle Garden before it was closed, that they might be taken care of during the night. He superintended the transfer of the passengers, and another person (Pe-

terson) had charge of the men that moved the baggage, which he landed on the wharf at Castle Garden, and put in an inclosed space.

I am unable to discover in the evidence any forcible dispossession of the plaintiff of such trunk, or any compulsion of her to place it on board of the baggage-boat. She was undoubtedly prevented from taking it with her in the passenger-boat, but that alone would not have compelled her to put it into the custody of the agents of the defendants, on board of the other boat. She might, for aught that appears to the contrary, have left it on board of the Illinois, and taken another opportunity to land with it in her possession ; unless the removal of herself and her baggage, as well as the other passengers, was by authority of the quarantine commissioners, and therefore peremptory ; under which, indeed, rather than that of the defendants, Finlay seems to have been acting, as the agent of such public officers. His separation of the passengers from the baggage may have been discreet, to prevent any delay in waiting for the latter, which might interfere with such passengers being landed and housed in Castle Garden that night. Passengers were notified they might take small packages of valuables, and it does not appear that the plaintiff claimed the trunk to be such. It appears to have been a box of dubious size for holding valuables (unless they were very numerous) ; at all events the plaintiff, without the least remonstrance, although it contained a great deal of money and valuables, as she stated, and she had had it in her berth, under her eye, the whole voyage, carried it herself to the side of the other tugboat and saw it put on board. No part of this evidence seems to me to be such an assumption of exclusive dominion or control over such box, by Finlay, as agent of the defendants, as to make the act of receiving it on board of the baggage-boat a conversion by them. If there was any evidence of it, it should have been submitted to the jury.

But, if such delivery was a voluntary bailment, without hire, the question of want of ordinary diligence in taking care of the box should have been submitted to the

jury, if there was any evidence of it. It seems by the testimony that after being placed on board of the tugboat (the Fletcher), all the baggage was landed as before mentioned, and left in charge of a watchman (Hartman) all night in an inclosure. All of it brought from the Illinois was there next morning, and was again in charge of a watchman (Peterson) all that day, until he was relieved by the previous watchman (Hartman), who remained until the second morning on guard, when the landing agent (Hall) came, who commenced delivering it, after an examination by custom-house officers, the plaintiff being present. Such watchman denied the removal of any of the baggage until that time, and the plaintiff's counsel admitted on the argument that such trunk was "so sedulously kept by the vigilance of its custodian that it could not be stolen or abstracted;" nor do I find any evidence of the want of the ordinary precautions taken by prudent men to take care of their property. If there was, it should have been submitted to the jury, unless downright negligence was proved.

I am not prepared to admit that, upon strong proof of great care of a bailee without hire, in guarding chattels delivered to him, so as almost to exclude the possibility of their disappearance without his connivance, a conversion to his use is to be presumed, or that it is by itself alone sufficient to go to a jury upon this point. At most it can only be a circumstance to be submitted to the jury, either alone or with others.

Upon either view of the case, therefore, either that of the court considering the defendants as common carriers, and liable as such without an appropriation of the property to their use, or that of the plaintiff's counsel considering the defendants either as *tortfeasors*, in taking or afterwards appropriating the goods or guilty of negligence in taking care of them, there should be a new trial.

The judgment and order denying a new trial must, therefore, be reversed, and such new trial had, with costs to abide the event.

Tolano v. National Steam Navigation Co.

MCCUNN, J. (dissenting).—I regret that I must dissent from some of the views set forth in the leading opinion of the court.

The action is to recover \$2,892.50, being the value of a small trunk and contents, which the plaintiff alleges the defendants wrongfully took and converted to their own use. The facts are substantially as follows :—The plaintiff was a passenger in one of the defendants' steamships (the *Helvetia*) from Liverpool to this port. On the arrival of the vessel here, it was found necessary to quarantine her, under our laws ; consequently, the passengers were sent, with all their luggage, to the steamship *Illinois*, then moored in the lower bay. At the expiration of some eighteen or twenty days, and after quarantine was perfected, the defendants sent their steamtugs and brought the passengers and their baggage to the city. The plaintiff had the small trunk—the one out of which this controversy arose—in her possession, and was guarding it herself, as she had done all the voyage. The defendants took the trunk from her against her will, and placed her in one tug and her property, together with this trunk, on another, to send them to this city. This was the last she saw of her trunk, or the articles it contained. She demanded her property ; the demand was refused. Hence this action. The complaint does not declare against the defendants as carriers, but simply against them for unlawfully taking and converting the property ; and I hold that, under the circumstances, this is the proper form of pleading.

The defendants answer that they are carriers for hire, but urge, against a recovery, that an action of trover will not lie for the mere omission of the carrier to deliver, as where the property has been stolen or lost through negligence, and so cannot be delivered to the owner. The remedy, their counsel says, in such cases, is *assumpsit*, or a special action on the case, and not trover, as he alleges this action is. Now, section 69 of the Code has abolished all distinctions between the mere forms of actions, and every action is now a special action on the case (*Goulet v. Assler*, 22 *N. Y.*, 228). The Code (§ 142), requires only a

plain and concise statement of the facts, constituting a cause of action, without repetition, and a demand for the requisite relief. Now, this complaint states, concisely and clearly, that her property was taken from her possession without her consent, and that, although she demanded a return of the same, yet it has not been returned, and she asks that the court award her its value. You may designate the action as an action in trover, or in assumpsit, or one on the case, or whatever else you may please to call it. I hold that nothing more is requisite in the complaint; and although some may cling to old and obsolete forms of pleading, yet to the plain mind (I mean those who seek speedy and substantial justice), and according to the law of the day, this is all that is required.

The learned counsel for the defense, in his effort to establish in the mind of the court that the form of action in this case should have been assumpsit and not trover, cites a synopsis of the case of *Ross v. Johnson*, cited (from 5 *Burr.*, 2825) in *Abbotts' Digest*, vol. 5, p. 243, pl. 12, forgetting this fact, that that authority is a century old, and that we have changed much in the forms of law pleadings since then, as well as in all things else. But even in the case of *Ross v. Johnson*, which I find reported at length in the second volume of Lord MANSFIELD's decisions by Evans, that most learned judge declares his disapprobation of nonsuits founded upon objections that have no relation to the merits of the action.

Moreover, Lord MANSFIELD said in that very litigation that the form of the suit should have been an action on the case, which form of action the suit at bar is, and I hold therefore, that the authority in *Ross v. Johnson* is an authority for the plaintiff. The action herein is not brought especially against the defendants as carriers. The complaint is simply for the taking and conversion of the plaintiff's property; facts which, without reference to form, in themselves constitute a substantial cause of action; and I hold that the court, under such a complaint, taking it in connection with the answer and the proofs in the case,

would be justified, without allegations that they were carriers, in holding them responsible.

Let us examine briefly what one of the best elementary writers says as to the form of pleadings adopted in the complaint. HILLIARD, on remedies for torts, writing in 1867, says: "In trover against carriers the declaration need not set forth the duty of the defendants as carriers, if it sets forth his negligence and loss;" and this rule was held in the case of *Wright v. McKee* (37 *Vt.*, 161), and was also applied in the case of *Crouch v. London, &c.* (14 *Eng. L. & Eq.*, 498), and these authorities are gleaned from reports adopted by States where a much stricter line of pleading is applied than in our State since our Code took effect; and I certainly can find no authority wherein this liberal rule is condemned.

The only exception that can be taken to the proceedings had before the judge below is, that in his charge he discussed at some length the law of carriers. Now, while such a discussion could perhaps have been dispensed with, has the course pursued by that learned judge in this respect, injured the defendant's case? It certainly has not, and the best evidence of his not injuring defendant's position before the jury in his charge is the fact that not a single exception to that charge was taken. Indeed, the answer, and the whole theory of the defense was, that the defendants were carriers, and were not answerable as such for this special property, and it was only at the request of the defendants' counsel, that the court applied the law of carriers at all; so that it would be unjust to have this court apply that rule to the plaintiff in the argument here, when it is clearly seen that the plaintiff's counsel protested against its application throughout at the trial below. Nor can the defendants request the court, at the trial of the issues of fact, to apply a rule of law in their favor against the will of the plaintiff, and then, in the appellate court, if that rule is improperly applied, take advantage of its improper application here. But this the defendants' counsel does not seek. In his brief he intimates that the complaint is broad enough to hold the defendants as carriers,

and in his answer he relies upon his clients' rights as such carriers; and on the trial at circuit he requested that the rule of law relating to carriers be strictly applied by the court, and argued that defendants should not be held liable for money or valuables which they did not, in their agreement with plaintiff as carriers, undertake to protect or forward. And the learned judge did apply the rules as requested, and that in the strictest sense of the word, for he charged the jury that plaintiff could only recover for necessary wearing apparel, and that if she had more money in the trunk than enough for traveling expenses, she could not recover the money over. If the complaint had been especially drawn so as to enable the plaintiff to recover against the defendants as carriers, the case could not have been more fully developed on the trial below than it has been. The plaintiff simply declared for taking and converting property. The defendants' answer, "we are carriers for hire between this port and Liverpool—we did agree to carry you and a certain quantity of baggage to New York, but you had money and property in that trunk of which you concealed from us a knowledge, and which, under the laws of this State, we, as carriers, are not responsible for, and therefore you cannot recover." Now, as I have stated before, the learned judge allowed this theory of the defense to go to the jury, and charged the law of carriers correctly, and that in favor of the defendants; and he submitted the question of necessary wearing apparel and the proper amount of money for traveling expenses to the jury. It will be said, however, that under the complaint (the complaint being for taking and converting) final judgment cannot be granted. There are two answers to this proposition. First, the complaint is broad enough to hold the defendants as carriers, because it was optional with the plaintiff to treat the defendants as common carriers, and sue in case for breach of duty, or to ignore their character as carriers, and to sue for conversion. He has chosen the latter, and the action lies. Second, if not broad enough, section 173 of the Code allows the court—I mean the appellate court and that of its own motion—when it

serves the ends of substantial justice, to make the pleadings conform to the facts proved on the trial.

The court of appeals applied this rule in the case of *Pratt v. Hudson River Railroad Company* (21 *N. Y.*, 305); and the general term of the supreme court allowed a similar amendment in the case of *Clark v. Dales* (20 *Barb.*, 42). Not only was this sound rule adopted in the above cases, but it was strictly applied in all of the following cases: *Coleman v. Plaisted*, 36 *Barb.*, 272; *Bowdin v. Coleman*, 3 *Abb. Pr.*, 431; *Harrower v. Heath*, 19 *Barb.*, 331; *Cady v. Allen*, 22 *Barb.*, 388; *Bates v. Graham*, 1 *Kern.*, 237. This doctrine was also established in this court in the case of *Foot v. Roberts*, decided at general term, July, 1868. In that case, Mr. Justice MONELL, in a very clear opinion, establishes beyond a doubt that the court has a right, in all cases where it serves the ends of substantial justice, to make the pleadings conform to the proofs.

It was "in furtherance of justice," as the statute declares, that such a section was added to the code. I mean the section enabling the appellate court to make such amendments; and surely a case never arose, and never can arise, wherein the statute can be applied and the ends of justice better subserved, than in this case. Let me ask, "What is the amendment, if any, required here?" Why, it simply requires the words "as carriers," to be added after the word "defendant," on line three of folio four of the complaint. It is conceded that in whatever light we may view this case, all the facts were fully developed on the trial, so as to enable the court to say whether the defendants shall be held liable as carriers, or for taking and converting, and there end the litigation. The learned judge below allowed the defendants and the plaintiff to place all the facts in the case in the fullest light before the jury, and allowed the jury to pass upon those facts; and if there were a thousand trials had hereafter, matters touching the property in controversy could not be made plainer. If this be so, why should the parties be subjected to a new trial, perhaps to a long and exceedingly expensive litigation, when this court sitting here in *banc* can apply a remedy?

Section 173 of the code, relating to such amendments, was designed among other things, to shorten litigation, to put an end to suits; and the courts in all cases, where the rule can be applied, should apply it strictly. I think, however, that the views set forth in the first branch of this opinion, are the correct views, and that the complaint, as it stands, is broad enough, and justifies the verdict of the jury. It is of little consequence whether the defendants took the property as carriers or as individuals, it is enough to sustain the action, that they took the property.

What is the object of plain pleading?

Why, it is to prevent, among other things, several actions from being brought for the same cause; and when the cause of action is so plainly stated that the facts can be developed at the trial and passed upon in such a form as to end the litigation, and prevent new suits for the same cause, this is all that is required, and no one will contend for a moment, after having examined the pleadings in this case, and after so full a development of the facts and circumstances on the trial below, that another action of any kind, especially an action against the defendants as carriers, could be maintained. I have had no opportunity of consulting with my associate justices, who heard the case (the papers having been submitted to me). Perhaps a discussion of the law and facts by them in my presence, or a knowledge of their views, might have induced me to concur with them about the application of the rules of law, but in the absence of such knowledge, and entertaining the views of the law applicable to such cases which I now entertain, I am for affirming the judgment with costs.

Judgment reversed, and new trial ordered.

BOLLES *against* DUFF.

Supreme Court, First District; Special Term, August, 1868.

RECEIVER.—MORTGAGEE IN POSSESSION.

In an action in which the plaintiff sought to charge the defendant as mortgagee in possession, of a theatre, of which the defendant claimed to be owner, the defendant, after having been adjudged to hold as such mortgagee, and having been appointed receiver, was permitted, pending his appeal, to lease the premises in litigation, for a term of three years.

Motion for leave to execute a lease of the premises in litigation in this action.

The facts material to the application are stated in the opinion.

BARNARD, J.—In this action and on this motion, the defendant, John A. Duff, claims to be the owner of the Olympic Theatre; but the plaintiff alleges he is only a mortgagee in possession. So far as an interlocutory decree has effect, the defendant has been so adjudged, pending his appeal. He has been by two justices of this court, and for the purposes of this decree, made receiver of the property. He, therefore, occupies a position different from a mere *court receiver*, who does not claim, and who has not been adjudged to have, any kind of interest in the property committed to his charge, and who is a mere stakeholder. He has moved the court for permission to continue the lease of the Olympic Theatre to the present lessee, James E. Hayes, who (it is not denied) has managed it for a season with extraordinary success, and benefit to the good-will of the property.

It is claimed, and not denied, that Mr. Hayes has, at

his own expense, and not as a charge upon the property, expended, for permanent improvements, some \$12,000, and on scenery and decorations, about \$9,000.

Eminent managers of theatrical property in this city, including Messrs. Lester Wallack, Moss, George Wood and Lafayette Harrison, have sworn that from \$12,000 to \$15,000 would be a fair rental of the property. Mr. Barnum and others, for the plaintiff, estimate the rental at not less than \$20,000. Some unverified offers, at a higher rent, were made on the part of the plaintiff. One witness swore, for the defendant, that \$15,000 would be a fair rental, and afterwards came forward for the plaintiff, and offered \$21,000, if he himself could have the lease. Of course, under such a state of affidavit-making, I must not consider his statements as evidence for either party. Either his affidavit or offer was insincere.

Since this motion was argued and submitted, a variety of offers, coupled with conditions of which I have no judicial knowledge, have been sent to me by the plaintiff, but as they are irregular, I only consider the question as it reached me on the argument. Considering, therefore, the expenditure by Mr. Hayes, and the peculiar position occupied by Mr. Duff, and the necessity of caring for the good-will of the property in competent hands, whether the property belongs to Mr. Duff, or whether he be only a trustee, and entirely rejecting the idea that the court should permit mere speculation in such peculiar property as theatrical property, pending claims of ownership, and a probable long litigation before those claims are definitely settled, and accepting an average between the evidence, as to value, the lowest being \$12,000, and the highest \$20,000, let the request of the receiver be granted, for a new lease for a term of three years, at \$15,000 per annum, to James E. Hayes, and to be executed in conformity with the terms contained in the annexed order.

THE MAYOR, &c. OF NEW YORK *against* WOOD.

Supreme Court, First District; Special Term, August,
1868.

COUNTER-CLAIM.—DEMAND FOR RENT.

In an action by a tenant, a municipal corporation, to annul an executory agreement for a lease under which the corporation have occupied, on the ground that fraud was practiced in procuring them to take it, the landlord may set up a counter-claim for rent accrued by such occupancy. The proposed lease, and the resolution of the corporation to accept it, are to be regarded as "the transaction" constituting the foundation of the plaintiff's claim.

The charges of fraud being unsustained, the defendant may, upon such counter-claim, recover rent down to the time of the commencement of the action.

The defendant may be allowed, at his option, to enter judgment for a specific performance of the agreement to execute the lease.

Motion for judgment.

This action was brought by the Mayor, &c. of New York against Fernando Wood, to annul a lease or agreement for a lease of buildings in Nassau-street, in the city of New York, belonging to the defendant, and occupied by certain officers for public offices.

Previous proceedings in the cause are reported, 3 *Ante*, 467, and 4 *Ante*, 152.

CARDOZO, J.—The only case attempted to be made by the complaint in this action, upon which the resolution in question is sought to be invalidated, is that the same was procured to be passed by the common council, and to be approved by the then mayor, by means of "fraud, bribery and corruption." There is no allegation except in reference to that point. The evidence, therefore, on the

trial, was confined to proof of that charge; and having utterly failed, the learned counsel to the corporation very properly withdrew "all charges of fraud, bribery and corruption" from the case.

The plaintiffs, therefore, upon the pleadings and the proofs, have no ground of complaint, and of course they are not entitled to any judgment in their favor.

The only questions really worthy of consideration are, whether the defendant Wood can recover rent in this action, and if so, down to what period.

The plaintiffs sought by their action to have the resolution of the common council annulled, and the making and delivery of the lease authorized and directed by that resolution, enjoined and prohibited.

I think it clear that the "transaction" constituting the foundation of the plaintiff's claim, consists of the resolution and the proposed lease, and that therefore there can be no doubt but that the defendant may counter-claim for the rent.

I do not stop to consider whether there be any force in the point taken by the counsel for the city, that no recovery can be had until a formal lease has been executed and delivered, because, conceding that to be so, upon the proofs before me, it would be my duty to decree specific performance and execution of the lease, and to render judgment for the amount due. All of that is within the case made by the answer and the proofs; and when that is so, the proper judgment is to be given, irrespective of what demand for relief the pleadings may contain (*N. Y. Ice Company v. Northwestern Ins. Co.*, 23 *N. Y.*, 357).

The main point upon which the learned counsel for the corporation seemed to rely, was based upon the question he raised as to the character of the tenancy of the city after the expiration of the lease directed to be renewed. He claimed that it was a mere holding over under the expired lease, and not an occupancy under the proposed new lease, or the resolution authorizing and directing its execution.

But this cannot be sustained.

Mayor, &c. of New York v. Wood.

The defendant Wood had notified the city that occupancy of any part of the premises, after the expiration of the then current lease, would be deemed an acceptance of the premises for the term and at the rent mentioned in the resolution; and after that notice, if the plaintiffs chose to occupy, they did so upon the terms prescribed by the owner of the fee, in that notice.

This point has been determined by the court of appeals (*Despard v. Walbridge*, 15 *N. Y.*, 374).

The resolution of the common council, approved by the mayor, is a sufficient signing, within the statute of frauds (*Carville, &c. v. The Mayor, &c.*, *N. Y. Com. Pleas, Gen. T.*)

Respecting the other points, I think no special remark is necessary. Either the proof disposes of them, or they are overruled by the cases mentioned by the corporation counsel himself. Indeed I may add, that the question of fraud being taken from the case, there is very little left of it, after the decision of Judge LEONARD, upon the motion for a mandamus (2 *Abb. Pr. N. S.*, 315).

As to the amount which Mr. Wood is entitled to recover in this action, I think it only necessary to say that I have concluded that it must be limited to the rent due when the action was commenced. For that sum, with interest and costs, judgment will be rendered in his favor against the plaintiffs; and if the defendant's attorney thinks proper to take it, the judgment may direct the execution and delivery, by the comptroller, of a lease pursuant to the resolution, in conformity with the views above expressed.

Judgment accordingly.

CARRINGTON *against* CROCKER.*Court of Appeals ; September Term, 1867.*

CAUSE OF ACTION. — SEVERANCE OF DEMAND OF JOINT CREDITORS. — LIMITATIONS.

An unsealed receipt, given by one of two joint creditors, expressed to be in full of his moiety of the debt, but for a sum of money less than a moiety, and without any new consideration, does not split the demand; and constitutes no bar to an action by both creditors to recover the balance due. If, in such a case, a subsequent release under seal be shown, expressing a new consideration, and releasing the debtor as to one moiety, the misjoinder of the releasor may be cured on the trial, by striking out his name, and the other creditor may recover his moiety.

The original part payment, although it may have been intended by the creditor receiving it, to extinguish one-half the demand, operated only *pro tanto*; and therefore may be relied on by the other creditor, as an acknowledgment of his demand, sufficient to take it out of the statute of limitations.

His subsequent assent to it as payment of one-half, by suing for the other half, does not relate back, so as to change the effect of the payment as an acknowledgment.

Appeal from a judgment of the supreme court.

This action was brought by Fredrick T. Carrington and Myron Pardee, against Lucius B. Crocker, upon an award made by arbitrators against the defendant.

The respondent, Carrington, and Myron Pardee, were partners in trade, and in the course of their business the appellant became indebted to them, as they claimed; and differences having arisen, either as to the existence of the indebtedness or its amount, the respective parties submitted themselves to an arbitration, the result of which was an award, on the 3rd day of December, 1852, in favor of Carrington and Pardee, against Crocker, for the sum of \$785.07.

Carrington v. Crocker.

In March, 1857, Carrington and Pardee brought an action in the supreme court, against Crocker, to recover the amount thus awarded.

Crocker's defense was—1st, the statute of limitations; 2nd, a release to him by Pardee of half the award, in consideration of \$200; and 3rd, that Pardee was improperly joined with Carrington as plaintiff.

In June, 1859, the cause was tried. The plaintiffs produced the award (which defendant admitted to have been made December 3, 1852), and offered to show that a payment had been made on it within six years.

The defendant objected, on the ground that such proof was inadmissible under the complaint, it not having alleged a new promise within six years.

This objection was overruled, the justice deciding that the complaint might be amended according to the facts. A receipt was then produced, indorsed upon a copy of the award, dated August 27, 1858, which receipt is quoted in the opinion below. This was the plaintiff's case.

The defendant introduced a release, dated April 8, 1859, made by Pardee to the defendant in consideration of \$200, of his (Pardee's) one-half of the award, and insisted on the objection of misjoinder of parties; and the court held that the objection might be remedied by striking out the name of Pardee as plaintiff.

On the conclusion of the trial, the court ordered judgment in favor of Carrington, as sole plaintiff, for one-half of the award, and interest from its date, with costs.

Judgment was entered in favor of Carrington, from which the defendant appealed to the general term, where the judgment was affirmed, and thereupon the defendant appealed to this court.

A. Perry, for the appellant.

Marsh & Webb, for the respondent.

FULLERTON, J.—Although, as a general rule, a demand due to several persons jointly, cannot be divided so as to allow the individual interests to be recovered in separate

actions, yet it may be done with the debtor's consent. The reason is, that the contract of the debtor is to pay the debt as an entirety to his joint creditors, and is therefore indivisible. The debtor, however, may, by a new contract, bind himself to account to the individual creditors for their respective interests in the demand, and such contracts are susceptible of being enforced.

The object of this rule is to protect the debtor from a multiplicity of actions, and the consequent increased expense ; but if he chooses to waive the protection which the law has provided him, no legal objection can be urged against it. The first question in this case, then, is whether Crocker consented to sever the joint interest of his creditors, and agreed to pay each of them a moiety of the demand. The award was made December 3, 1852, in favor of the plaintiff and Myron Pardee, who at the time were copartners in trade. On the 27th of August, 1858, the defendant paid Pardee \$200 on account of the award, and took the following receipt, indorsed on the award :

“ Received, Oswego, August 27, 1858, two hundred dollars, in full for my one-half interest in the above award.”

The terms of this receipt leave no doubt as to the intention of the parties to split the demand : but they did not effectuate it so as to make it binding on the owners of the claim. The payment, and the receipt given for it, did not operate as a satisfaction of one-half the claim, for the reason that there was no consideration moving between the parties which could affect the claim beyond the amount paid. It is a well-settled rule of law, though it is seldom applied, that the payment of a smaller sum cannot operate as a satisfaction of a larger (*Cumber v. Wane*, 1 *Smith Lead. Ca.*, 301, 6th Eng. ed. ; S. C., 1 *Str.*, 426, and cases there cited).

At the time this sum of \$200 was paid, the whole award and the interest thereon, was due, and one-half the principal sum was far more than that amount.

There having been no new consideration for the promise to satisfy any part of this demand, beyond the amount

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paid, and there being no release under seal, it follows that the whole award, with interest, less the \$200 paid, was a valid demand against the defendant, in favor of both Carrington and Pardee.

The receipt, therefore, did not split the demand, and the action was properly brought in their joint names, and could have been maintained, had it not been for the release of April 8, 1859. That instrument, under seal, and expressing a new consideration, consummated the agreement between Pardee and Crocker, which before that had remained inchoate, and, as between the parties to it, effectually extinguished one-half the whole demand, leaving Carrington to prosecute his action for his half.

That this was the intention of the parties to the receipt and release, there can be no doubt. When Crocker agreed to pay Pardee \$200 as and for his one-half of the award, he doubtless meant that the other half should become the property of the plaintiff.

The defendant himself took the same view of the transaction; for in his original answer to the complaint, in which Carrington and Pardee were both plaintiffs, he claims as a defense, that "Pardee was improperly joined with Carrington as a party plaintiff," because he had "released *his* interest in the award." The defendant appears to have deliberately agreed that the interests of his creditors should be separate, and he cannot complain if he is held to his contract.

Even if this were not so, the defendant could not avail himself of the objection that there was a defect of parties plaintiff in the amended complaint, after the name of Pardee had been stricken out.

This defect, if any, appeared on the *face of the complaint*, and the only remedy in such a case is by demurrer, and the objection cannot be taken by *answer* (*vide* *Depuy v. Strong*, *post*, 340).

Neither can it be maintained that the release of Pardee of his one-half of said award, operated as a release of the whole.

It was not so intended by the parties, neither is that its legal effect.

The authorities cited to show that a release by one of several joint creditors of a debt or demand will bar an action by others, have no application in this case.

I cannot agree with the learned judge who delivered the opinion in the court below, that the payment of the \$200 did not take the case out of the statute of limitations. The reason given in support of that view of the matter is, that this action is for one-half of the demand, and upon that specific half nothing had been paid.

That proposition is true ; but it does not by any means follow that the payment was not made on the demand as a whole. If the demand had been severed by a valid agreement before the payment was made, then the payment would necessarily have applied solely to the extinguishment of Pardee's interest.

But that was not the case.

I have already shown that the payment of the \$200, when the receipt was given, extinguished the demand only *pro tanto*, and not one-half of it, and that Carrington was entirely unaffected by that payment and receipt, except so far as the amount paid went to satisfy the joint demand as a *whole*.

He had given no consent that Pardee's interest should be severed, and without such consent Pardee could not appropriate to his exclusive use the payment made, because Carrington could have compelled Pardee to account to him for one-half of the \$200.

Adopting this mode of reasoning, which seems to be sound, the payment made was on account of the whole demand, and not on a moiety of it, and consequently the statute of limitations has not run against it.

The fact that Carrington assented to what had been done, by amending his complaint on the trial, and claiming to recover his half of the award, does not affect the application of this rule to the case.

The assent then given does not relate back, so as to change the character or effect of the payment.

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It was still a payment on the demand, before the interests of the parties were severed, and affected the whole claim.

The judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed.

DEPUY *against* STRONG.

Court of Appeals; September Term, 1867.

PARTIES IN ACTION FOR TRESPASS ON LANDS HELD IN COMMON.

Tenants in common of lands must all be joined as parties, in an action to recover damages for trespass upon such lands. This common law rule has not been altered by the Code of Procedure.

In an action for trespass upon lands held in common, if it appear by the complaint that the plaintiffs are only part of the owners, and it does not appear that the others are joined as defendants, by reason of not consenting to join in the action, a demurrer is the proper remedy to raise the objection of a defect of parties.

An answer interposing that objection in such a case is a nullity.

If a demurrer to a complaint, on the ground that a defect of parties appears on its face, is overruled, the defect is waived by an answer interposing the same objection. Demurrer is the proper remedy, and if it be overruled, the defendant should appeal, if he would insist on the defect.

Appeal from a judgment of the supreme court in the third judicial district.

This action was brought by Thomas R. H. Depuy and others (the present appellants) against Austin Strong and others (the respondents), to recover damages for entering upon lands, cutting timber, and removing therefrom timber and bark.

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The complaint set forth that the plaintiffs owned certain individual interests in the lands in question, with other necessary averments charging the defendants with trespassing thereon. The defendants demurred to the complaint, on the ground of a defect of necessary parties plaintiff.

The demurrer was heard at special term, and overruled, with leave to defendants to answer, upon terms. The defendants then answered the complaint, and, among other defenses, insisted upon the non-joinder of parties plaintiff. Upon the trial of the issues, it was shown that plaintiffs were tenants in common of the lands trespassed on, with other parties.

Upon this ground the plaintiffs were nonsuited ; and after affirmance of the judgment by the court at general term, they appealed to this court.

James Matthews, for the appellants.

Niven & Thompson, for the respondents.

GROVER, J.—The law in this State, prior to the enactment of the Code, was settled, that tenants in common must all join in an action of trespass to recover damages for injuries to real estate held in common (*Hill v. Gibbs*, and cases cited, 5 *Hill*, 56). The rule applied to personal, and not to realty actions. It was founded upon the idea that it was an injury to the possession, and that as the possession of one tenant in common was regarded as the possession of all, the injury was to their joint right, and therefore all must join in prosecuting the remedy. The law having been so determined, it must still be so held, unless changed by the legislature.

It is claimed that section 111 of the Code of Procedure has changed the law in this respect.

That section provides that every action must be prosecuted in the name of the real party in interest, with exceptions not applicable to the present case. The only change effected by this provision was, to enable courts of law to treat assignments of certain choses in action as

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transferring the legal title, which at common law transferred only the equitable. The rule at the common law was, that the owner of the legal title must sue. Section 119 has, I think, no bearing upon the question in this case. That provides that those united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. This clearly does not authorize the omission of a party which the existing law required. It is said that it would be incongruous to make one tenant in common a co-defendant with a trespasser, upon his refusal to join as plaintiff. This is so, but the answer is, that that is the only remedy provided by the Code for a case where, before, if he refused to join as plaintiff, his co-tenant could not maintain an action at all, unless the court, upon the special facts, permitted his name to be used as plaintiff. I think it clear that the Code has not changed the law as to the requisite parties in this class of actions.

The question arises as to the mode in which the defendant may avail himself of the omission to join a co-tenant as plaintiff. Previous to the Code this could only be done by demurrer, when the defect appeared upon the *narr.*, or, in case it did not, by plea in abatement. The latter plea has been abolished by the Code, the only mode provided for presenting a defense being by demurrer or answer. Section 144, among other things, provides that a defendant may demur to the complaint, when it shall appear upon the face thereof that there is a defect of parties plaintiff or defendant. In the present case the defect of parties plaintiff did appear upon the face of the complaint. The plaintiffs alleged that they owned an undivided interest in the land.

The remaining interest must, of necessity, have been owned by others, either as joint-tenants, or tenants in common with the plaintiffs.

In either case, the co-tenants were necessary parties. One mode of presenting this question, provided by the

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Code, was by demurring to the complaint. This the defendants interposed. The special term erroneously overruled it, and gave the defendants leave to answer. The defendants answered, setting up, among other defenses, the defect of parties plaintiff. This was an abandonment of the demurrer, and placed the case in the same position as though none had been interposed. It remains to inquire whether, in case the defect does appear upon the face of the complaint, it can be made available by answer. This inquiry is answered by section 147. That provides that when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This clearly implies that when the defect appears upon the face of the complaint, it is available only by a demurrer to the complaint. This being so, setting it up in the answer is a mere nullity.

The defendants, instead of answering, should have appealed from the judgment ordered upon the demurrer. It has been repeatedly held by this court that defects of this description must be insisted upon in the mode provided by the Code, or they are waived (33 *N. Y.*, 43; 32 *Id.*, 685).

The judgment appealed from must be reversed, and a new trial ordered. If the defendant has any relief under the peculiar facts of this case, it is by obtaining leave in the supreme court to withdraw his answer, and that judgment be entered upon the demurrer.

FULLERTON, J.—This action was brought to recover damages for trespass on lands. The plaintiffs, in their complaint, claimed to be owners in fee of considerably less than a moiety of the lands on which the injury was committed. The defendants demurred to the complaint for non-joinder of all the tenants in common, either as plaintiffs or defendants. The demurrer was held bad, and the defendants had leave to answer, of which leave they availed themselves. The issues were tried before Mr. Justice HOGBOOM and a jury, and a verdict of \$30 rendered for the plaintiffs.

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The defendants appealed to the general term, and a new trial was ordered, the verdict of the jury being set aside, on the ground that tenants in common could not sever in an action for trespass on their lands so held in common.

The cause was again tried before the same justice and a jury, and the defendants moved for a nonsuit, on the ground that the plaintiffs had failed to establish title to the premises; also that, the testimony showing that there were other persons, owners as tenants in common, of the premises in question, the action could not be maintained. The motion for nonsuit was granted, upon the ground that tenants in common must all be joined as parties in actions for trespass upon the lands owned in common. The plaintiffs appealed to general term, where a new trial was denied; and from that decision they appeal to this court.

It must be conceded that, before the Code, the rule in this State was, that tenants in common must join in actions to recover for injuries to the realty (*Austin v. Hall*, 13 *Johns.*, 286; *Low v. Mumford*, 14 *Id.*, 426; *Decker v. Livingston*, 15 *Id.*, 479; *Hill v. Gibbs*, 5 *Hill*, 56, *note*). This rule has not been altered by the Code. The only change it has made is in the mode of taking advantage of a defect of parties. Under the old system the only remedy was by plea in abatement; and if that were not interposed, a tenant in common could still recover. The defendant could show on the trial that there were others interested in the claim, not by way of bar, but to limit the plaintiff's recovery to his aliquot part of the damages sustained. Now, the defendant may have his remedy by demurrer, if the defect appear on the face of the complaint, or by answer if it does not.

The only question in this case, as I view it, is whether, when the defect of parties appears on the face of the complaint, the defendant can omit to demur, and take advantage of it by answer; and this point seems to be well settled by authority (*Dennison v. Dennison*, 9 *How. Pr.*, 247; *Osgood v. Whittlesey*, 10 *Abb. Pr.*, 134; *Ingraham v.*

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Baldwin, 12 *Barb.*, 18; Baggott v. Boulger, 2 *Duer*, 169; Zabriskie v. Smith, 13 *N. Y.* [3 *Kern.*], 336).

In this last case, Judge DENIO, in discussing the question, remarks: "A dilatory defense, which a plea in abatement is considered to be, is not favored; but he that is entitled to avail himself of it must interpose it promptly, according to the established forms. Here the facts were fully disclosed by the complaint, and the defendant *could have demurred*. The authority to object by way of answer is, in terms, limited to cases where the fact does not appear in the prior pleading. When, therefore, the last section (148), which I have quoted, declares that if the objection is not taken by demurrer or answer, it shall be considered as waived, it means that if it be not taken by demurrer where that mode is proper, or by answer, in cases where that is the appropriate method, it is waived. This construction will give full effect to all the language, and will, besides, compel the defendant to take his ground with the promptness inculcated by the rule of pleading to which I have referred."

This question was again considered in this court in *Merritt v. Walsh* (32 *N. Y.*, 690), and *Zabriskie v. Smith* was there cited as settling the rule. The question is therefore no longer open for consideration. Where a demurrer can be interposed for a defect of parties, the defendant is confined to that remedy alone, and it is only where evidence is necessary to make the defect apparent, that an answer to that point is permitted.

The complaint in this action distinctly alleges that each of the plaintiffs is the owner in fee of a specified fractional part of the lands on which the trespasses were committed, the sum of which parts is much less than the whole of the lands; thereby admitting that there were other parties jointly interested with the plaintiffs in the claim sought to be recovered, and thus bringing the case directly within the rule established.

The defendants were therefore right, in the first instance, in interposing a demurrer to the complaint, and when it was overruled, they should have corrected the

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error by an appeal. Having omitted to do so, they have acquiesced in the judgment, and are concluded by it. If the merits of that decision were before us in this controversy, we should correct the error, but they are not; and the case stands precisely as if no demurrer had been interposed. That being so, as we hold that the question could not be raised by answer, it follows that the plaintiffs were at liberty to recover their aliquot proportion of the damages proved on the trial.

The judgment of the general and special terms should be reversed, and a new trial granted, costs to abide the event.

All the judges concurred in reversing the judgment appealed from.

Judgment reversed.

HOGLE *against* THE GUARDIAN LIFE INSURANCE COMPANY.

New York Superior Court, General Term; May, 1868.

PARTIES IN ACTIONS ON INSURANCE POLICIES.—DEFENSES.

The words "the assured," in the covenant to pay contained in a policy of life insurance, are to be construed to mean the person for whose benefit the insurance is made, rather than the one upon whose life it depends. Thus, where one person procures his own life to be insured, pays the premium, and accepts the policy, expressed to be for the benefit of a third person, the latter may recover thereon by an action in his or her own name. An erroneous answer by an applicant for insurance, addressed to the medical examiner employed by the insurance company,—*Held*, not to amount to a misrepresentation.

Appeal from a judgment.

This action was brought by Sarah F. Hogle against the Guardian Life Insurance Company.

It appeared by the case made that on the 6th of September, 1866, Effingham H. Warner, then sixty-six years old, procured the defendants to issue a policy of insurance upon his life for the benefit of his daughter (the plaintiff) in the sum of \$10,000.

In 1866, Mr. Warner had had an attack from which he was quite sick. On the 30th of August, he presented himself to the physician of the Equitable Insurance Company for re-examination (having before been examined, and passed by him, in the spring of 1866). He was passed and took a policy for \$10,000 for the benefit of his wife. On or about the 6th of September, 1866, when and before Warner applied for insurance to the defendants, he was examined by Dr. McFarland, one of defendants' examining physicians, and he declined to certify to his good health, and refused to pass him. An insurance agent had him examined by another of defendants' examining physicians; that physician passed him, and the defendants insured him for \$10,000. He was taken sick in November, 1866, and never recovered; he died in February, 1867.

It was claimed on the part of the defendants that the deceased incorrectly answered several questions put to him on his examination. It was also claimed by the defendants that the August sickness was a serious illness, although not so represented by Mr. Warner on applying.

The referee reported in favor of the plaintiff for the amount of the policy, less the note given for part of the premium; upon which report judgment was entered.

It was not claimed that Mr. Warner incorrectly answered any of the interrogatories put to him, in regard to the particulars of his health, history, &c., when examined for this insurance, excepting that numbered 21, which was, "Have you ever had any serious illness or personal injury?" "No—fever seven years ago." The other answers to 10, 12, and 15 were made by the medical examiner of the defendants, after an examination of Warner; and the examiner states Warner answered the questions put

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by him, which answers he, the examiner, adopted as his own in his report to the company.

Livingston K. Miller, and Wheeler H. Peckham, for the appellants.

Mr. Walden, for the respondents.

BY THE COURT.—GARVIN, J.—This action is brought by the daughter of E. H. Warner, who himself procured his life to be insured for \$10,000. The defendants insist that inasmuch as the loss is payable to the assured, his executors, administrators and assigns, the plaintiff cannot maintain this action. The parties are bound by the contract found in the policy. The defendants agree, in consideration of the premium paid and to be paid, to insure him in the sum of \$10,000 for the period of his natural life; and the defendants agree, sixty days after notice and proof of his death, to pay the assured, his executors, &c., the sum assured. This is expressed on the face of the policy to be for plaintiff's benefit. If "assured" means the plaintiff, she can maintain this action. The objection is put upon the language of the policy and its legal import. Let us see. It is for her benefit. No one can recover the sum assured until after his death. Subsequent to that event he cannot sue. The fruits of the contract are solely hers. Upon these facts she certainly can maintain the action, unless there is some legal rule which prevents it. She is the party in interest. The meaning of the term "assured" is to be derived from the connection. In reinsurance it is applied to the party that has already taken a risk as insurer; not to the assured in the original policy (*Carrington v. Commercial Ins. Co.*, 1 *Bosw.*, 152). In this case, not to the person whose life is insured, but to the plaintiff, for whose benefit it was made. The father made the contract. The daughter was to have the fruits. Thus, in terms it must refer to the plaintiff, and cannot be applied to the deceased. But it is said "his," immediately following "assured," qualifies and controls the

meaning. This is plausible and ingenious, and upon the argument made some impression upon my mind. But I think it is overturned both by reason and authority. In *Church v. Hubbait* (2 *Cranch*, 187), the objection was taken that the action was brought in the name of John B. Church, Jr., when the contract was made with John B. Church. Justice CUSHING, who tried the case at circuit, says: "From the evidence it is plain the policy was for the son; the property of ship and cargo is proved to be in the plaintiff;" thus establishing the principle that where there are divers persons answering to the description of the assured, the policy is applied to the interest of the party for whom it was intended (1 *Phill. on Ins.*, § 411). It is also laid down in *Reynolds on Life Insurance* (§ 22), that the "assured" is the person who is to receive the benefit of the insurance. We must therefore assume the promise was to pay the plaintiff, which brings the case within all the authorities. The contract was with Warner, whose life was insured for her benefit, and the promise is to pay her. The action is properly brought in her name (*Lawrence v. Fox*, 20 *N. Y.*, 268), but whether this is so or not, the plaintiff is the real party in interest, and can maintain the action (*Code*, § 111). The insurance was effected by Warner. He applied for it, paid the premium, took all the initiatory steps for proving it. It was delivered to Warner, and nothing is clearer than that Warner could make the loss payable to whom he pleased. He did so, making it payable to her. Therefore, the question of whether she had an insurable interest in the life of her father, does not and cannot arise. Any person has the right to insure his own life, though he does it for the benefit of another (*Rawls v. American Life Ins. Co.*, 27 *N. Y.*, 282). He may have the loss payable to the assured, or to his own assignee or appointee; and whichever be the form, his interest in his own life is the same. There is, therefore, no question as to her interest in his life. That question does not arise (13 *N. Y.* [3 *Kern.*], 31; 23 *N. Y.*, 516). A policy of insurance effected upon one's own life may be disposed of as the insured sees fit. It is not ma-

terial that the beneficiary, appointee, or assignee have an interest in the life of the insured at the inception of the policy. A valid policy once made, it so remains if the conditions are complied with (20 *N. Y.*, 32). On the termination of the life, the sum assured is payable (27 *N. Y.*, 290).

This brings us to the main question in the case, and the one which the defendants urged upon the argument with great firmness and resolution. It is claimed by the defendants that Warner misrepresented the facts as to his August sickness, and untruly represented that certain of his organs properly performed their functions. These misrepresentations are based upon a statement made by Warner to the company in his application, that he had never had any serious illness, except fever seven years before, and that the functions of the abdominal and urinary organs were properly performed. The last statement was made in answer to a question put by the examining physician.

It can hardly be said, in regard to the last statement, that it was a misrepresentation, taking into account all the evidence in the case. The company did not rely upon what Warner told the doctor, but on the doctor's report, which is supposed to embody his opinion, not the patient's statements. The defendants could have put the questions and taken Warner's answers, but their object and design was to obtain a professional opinion. As such, his answers must be taken and regarded by us. It was the doctor's duty to make such personal examination of Warner as to satisfy himself, as he was answering to the defendants. This we must presume he did. He was in the defendants' employ, and was bound conscientiously—as he doubtless did—to discharge his trust. The doctor says (after describing his height and complexion), "he had a healthy appearance, and was a well-preserved man of his age. If he had been feeble I should have remarked it, and should have examined as to its cause;" thus showing that the doctor did more than take his mere answers, and was satisfied to answer as he did. This statement must

be referred to the general condition of the specified organs, not to occasional and temporary derangements of the system, which are common to all. The very next question is in a form which, if addressed by the doctor to Warner in regard to the point under consideration, would have elicited a history of any and all difficulties of the organs in question, showing that question 10 was only intended to call for general information from the doctor by the company, and not the past and present history of the functions referred to. But it appears, as a matter of fact, that the doctor was told Warner had had colic, at this interview.

It is difficult to see how the physician could have been misled in his opinion by the answers made to him by Warner, or the company in any way deceived. Again: was the August illness serious? Certain facts are not disputed. The statement was made by Warner that he never had any "*serious illness*" (except that of a fever, seven years before); that he was ill in August, 1866; made the statement in September following, and died February 16, 1867. But where there is such abundant medical testimony to sustain the interpretation given by the referee to the character of the August illness, taken in connection with the reasoning which must occur to the common mind for not regarding such an illness serious, we should be hardly justified in disturbing the judgment, upon the ground that it was misrepresented. As a question of fact, the finding of the referee must be regarded as conclusive. It is true there is evidence on the part of the defendants of a character which, taken alone and unanswered, would be entirely controlling against this view of the case; but the decision of the referee, like the verdict of a jury, should not be disturbed when founded upon conflicting evidence. There must be an end of litigation, and questions of fact can only be settled by adhering to this rule.

As to his answer in regard to the character of the August illness, it was the mere expression of an opinion, and was neither a warranty nor a misrepresentation. The sickness was recent, and therefore remembered, but if he

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did not consider it serious, it in his opinion did not call for an affirmative answer. Many persons do not call an illness serious which does not utterly prostrate them for the time being; if they are able to be about their house, are up from their bed every day and dressed: more especially is it so with those whose business is in-doors.

This may have been, and doubtless was, the opinion of Warner. In this opinion he is confirmed by his family physician, and several physicians who have testified upon the trial. We must therefore hold that Warner fully answered all the questions put to him, and having done so he was not bound to go any further (27 N. Y., 295).

We think the cause has been well tried, and the judgment should be affirmed, with costs.

Judgment affirmed.

*affirmed,
July 288.*

SEYBELL *against* THE NATIONAL CURRENCY BANK.

New York Common Pleas; General Term, June, 1868.

EVIDENCE.—PROOF OF BAD FAITH IN BUYING STOLEN NEGOTIABLE PAPER.

In an action brought against a purchaser of government securities payable to bearer, by one from whom they had been previously stolen, evidence explaining that the defendants purchased without regard to notices of theft and loss sent them, because the magnitude of their business and the number of such notices were such that it would be impracticable to deal in such securities if they were bound to examine such notices,—is admissible.

Negligence, though gross, is not enough of itself to charge the purchasers of stolen paper which is negotiable by delivery. There must be want of good faith.

Appeal from a judgment.

The facts appear in the opinion of the court.

E. More, for the defendants, appellants.

William R. Stafford, for the plaintiff, respondent.

DALY, F. J.—It was held, in *Murry v. Lardner* (2 *Wall. U. S.*, 110), that a purchaser in good faith, for a valuable consideration, of government securities transferable by delivery, acquires a title valid against all the world: and that to constitute want of good faith there must be knowledge of the want of title, or, as Baron PARK said in *May v. Chapman* (16 *Mees. & W.*, 261), the means of knowledge to which the purchaser willfully shuts his eyes; that it will not suffice that there was on his part a want of care and caution, or gross negligence, or a knowledge of circumstances which would excite suspicion in the mind of a prudent man, the rule in respect to *mala fides* being a question of honesty or dishonesty, of the existence either of guilty knowledge or of that willful ignorance which is equivalent to it.

This decision, though not of controlling authority in a State tribunal, is entitled to the greatest weight, in view of the circumstances under which it was decided. There had been a previous ruling of the court to the same effect in *Goodman v. Simonds* (20 *How. U. S.*, 343)—a case which was most elaborately argued, and in which all the authorities bearing upon the subject, either in this country or in England, were reviewed. The ruling of the court in this case was deliberately reconsidered in *Murry v. Lardner*, the leading English authorities were again examined, the reasons which had satisfied the court before were maturely weighed, and this ruling was sustained by a unanimous decision. A judicial conclusion so deliberately arrived at by the highest court in the nation, upon a point which affects the whole commercial world, is not only entitled, as I have said, to the greatest weight, but should be regarded as settling the law in this country.

The defendant in the case now before us is a banking corporation, dealing largely, as they offered to show, in

government securities. The two bonds, for the conversion of which the action was brought, and which were stolen from the plaintiff, were bought by the defendant in the usual course of business, at a fair market value. The clerk or officer by whom they were purchased had left the bank nine months before the trial, and was, by report, in the State of Iowa. It appeared, however, by the books of the bank, and by the testimony of the cashier, that the two bonds were purchased from the 13th to the 18th of Sept., 1865, the entries indicating that the purchase was made on the 13th, the day after the robbery. The market rate on that day was between 107 and 108, varying from 107 to 107 $\frac{1}{2}$, and they were bought at 107 $\frac{1}{2}$. A purchase like this, by a bank, at their fair market value, and in the usual course of business, of government bonds, which pass by delivery, was conclusive upon the question of good faith, unless the plaintiff could show that the defendant purchased with a knowledge of the robbery, or with the means of knowledge at hand which they intentionally avoided.

The evidence relied upon to show this was that a printed handbill, announcing the loss and describing the bonds, was, on the morning after the robbery, left before 9 o'clock on the desk of the cashier of the bank, and on the desk opposite, but it was not shown that the handbill was seen or came to the knowledge of any of the officers or employees of the bank.

The plaintiff testified that he called upon the cashier after the 23d of Sept., and told him that he had sent to the bank a printed notice of the robbery, and that the cashier replied, "We don't care for notice;" which the cashier, in his testimony, qualified by saying that he told him that they could not pay attention to notices, or something like that, and which he said was true. "We buy and sell," he said, "bonds, without any regard to these notices left in the office. We look at notices from time to time, but we keep no record of them. No instructions are given by me to the clerks or officers to bring the notices to me personally."

This was all the evidence relied upon to show *mala*

fides. It was, to say the least, very slight ; and was submitted to the jury by the court with the instructions that if the defendant either had, or with reasonable care and attention might have had, notice of the loss, the plaintiff was entitled to recover ; to which the defendant excepted.

The exception was well taken, as this was in effect holding that a bank, broker, or other person who buys a negotiable government bond, in the usual course of business and pays the fair market value for it, acquires no title if he might, by the exercise of reasonable care and attention, have ascertained that it had been stolen. A rule like this would make it the duty of the banks to take notice at their peril, of all printed notices sent to them of the loss of government bonds, bills, or other negotiable securities in which they deal, to keep an accurate record of all information of this kind sent to them, and to consult it in every instance, at the risk of liability, before they ventured to purchase a bond or to discount paper. They would, in fact, have to institute an inquiry in every case, a rule which, as Lord KENYON said, in *Lawson v. Weston* (4 *Esp.*, 56), would paralyze the circulation of all the paper in the country.

The defendants offered to show that they dealt largely in government bonds, receiving and paying them out as money ; that United States securities of the description of the two bonds in question are payable to bearer ; that they are bought and sold daily in the market, and are received and paid out by banks, brokers and bankers as money ; that they pass from hand to hand by delivery, and are always paid for in cash on delivery ; that the amount in circulation is very great, and that very large amounts, several millions, have been stolen and advertised ; that the amount in circulation is so large, the amount stolen or lost so great, and the notices of theft and losses so frequent, that it would be impossible for the defendants to keep track of those lost or stolen, without stopping their business ; that notices are constantly thrown to their bank of such thefts or losses, with lists, numbers and descriptions, and that, if they were bound to take notice of all such no-

Seybell v. National Currency Bank.

tices, it would be impracticable to deal in government securities; which offer on their part was excluded.

All, in my judgment, that could be legitimately inferred from the omission of the defendants to pay attention to such notices when they purchase negotiable securities of this kind in the regular course of business, and pay the market value for them, would be the want of care and caution, or, at best, gross negligence on their part, and this, according to the rule laid down in the two cases before referred to, of *Goodman v. Simonds* and *Murry v. Lardner*, would not be sufficient to destroy their title. Under certain circumstances, gross negligence may be evidence tending to show *mala fides* (*Goodman v. Harvey*, 4 *Adol. & E.*, 870), and assuming that the habit of the bank to pay no attention to such notices was evidence from which the jury might infer that the defendants acted in good faith, then the evidence which they offered, and which the court excluded, should have been received, for it was most material upon the question of dishonest intent. It was material, as showing that their motive was not to facilitate the sale of bonds dishonestly acquired for their own pecuniary benefit, but that they did so because it was impracticable, from the magnitude of the amount of such bonds in circulation, and the large amount that had been lost and stolen, to do otherwise. If the evidence given was sufficient to submit the question of a want of good faith to the jury, then the defendants were certainly entitled to the benefit of what they offered to show, and for this reason a new trial should be granted.

Ordered accordingly.

MONEYPENNY *against* THE SIXTH AVENUE
RAILROAD COMPANY.

New York Superior Court; Special Term, 1866.

PENAL ACTION FOR EXCESSIVE FARES.—CITY RAIL-
ROADS.

The Sixth Avenue Railroad Company in the city of New York had a right, notwithstanding the restriction in their grant to fares of five cents, to increase their fares to six cents, when paid in paper, upon the suspension of specie payments.

The act of Congress (13 *U. S. Stat. at L.*, 276, 485),—which authorized railroad companies to add the tax to their fares,—empowered city railroads to make such increase.

The penal action given by the *Laws of N. Y.*, 1857, against railroad companies demanding fares in excess of the rate allowed by law, does not apply to city railroads.

Demurrer to answer.

This action was brought by Gustavus Money Penny against the Sixth Avenue Railroad Company, the owners and managers of a horse railroad in the streets of the city of New York, to recover the penalty given by the railroad act of 1857 for exacting tolls or fares exceeding the rates allowed by law.

The defendants' rate of fare was originally fixed at five cents for any distance upon the line, by the grant and contract under which they obtained from the common council the right to establish the road. After the enactment of the act of Congress of 1864,—which imposed a tax upon the receipts of railroads, and authorized them to add the amount of the tax to their fares,—the defendants raised their fares to six cents.

The plaintiff Money Penny, when riding on the road, refused to pay the extra cent charged by the railroad

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company, and was, in consequence, put off the cars; and this suit was then brought by him to recover the penalty under the general railroad act of 1857.

The defendants answered, that the general railroad act did not apply to city railroads, and that it was intended only to apply to the railroads of the interior of the State.

To this answer plaintiff demurred, and the cause now came up on the demurrer.

John Slosson, for the defendants.

—— ———, for the plaintiff.

MCCUNN, J.—The first question is, whether the penal act of 1857 applies to city railroads incorporated under the general act of 1850, but whose fare for the transportation of passengers was fixed or regulated by contract with the city authorities, who bestowed the grant, and which contract has been confirmed by the legislature of 1854?

The act of 1857 refers, by its very terms, only to companies other than city companies.

In *Chase v. New York Central Railroad Company* (26 *N. Y.*, 526), the court says, that “the statute of 1857 has reference to the statutes in which the rate for carrying passengers is fixed and allowed,” and not to exceed two cents per mile, and that it has no reference whatever to city roads. Indeed, the language of the act shows that it could not have been intended to refer to companies whose fare was fixed at a sum certain for any distance, great or small.

The penalty is prescribed against any company which shall ask and receive a greater rate of fare than that allowed by law, to wit, two cents per mile, and declares that it shall be lawful to take the legal statutory fare for one mile for any fractional distance less than a mile.

Unless, therefore, the fare of the defendants in the present action is to be governed by the mile, and not by their contract with the city, under which they have always received their fare, but by the general railroad act, it is manifest the act of 1857 has no application.

The act was never intended to apply to a city railroad company, who are carriers of passengers only ; and this is manifest from the language of the statute, which provides that every corporation formed under it shall have power "to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor ; but such compensation for any passenger and his ordinary baggage shall not exceed three cents per mile." It would, therefore, be impossible to apply it to a city railroad.

The railroads of the interior have stations at fixed points, from and to which the fare is computable, and at which passengers get in and out of the cars. With our city roads a passenger gets on and off at all points. He pays his six cents, and rides to where he pleases. Moreover, if the act of 1857 had any application to city roads, these defendants may use "steam" (sub. 7, 5, 28), and may demand an extra five cents from passengers not purchasing tickets (§ 87) ; and the companies are also obliged to erect fences along their entire route (§ 56) ; and may also take all the real property they require for the purposes of their business (a depot, for instance), and acquire the legal title against the will of the owner (§§ 13, 14, 32). It is clear, therefore, that the general railroad act is not to be stretched beyond its reasonable application. But, in addition to all this, the act of 1854 takes the whole subject of fare out of the operation of section 28 of the general act.

This act (act of 1854) applies exclusively to city railroads, which commence and end in the city. It authorizes the common council to grant the right to construct and establish railroads upon such terms, conditions and stipulations in relation thereto as such common council may see fit to prescribe. Now, these defendants had been actually incorporated nearly three years at the time of the passage of this act, and had in part constructed their road. They therefore came within its provisions, and by its very terms they were placed in the position in which they would have been, had they obtained their license

from the common council after the passage of the act, and in strict compliance with its terms.

But while the act of 1854 ratified and sanctioned the agreement made between these defendants and the common council, and thus took the subject of fare out of the general statute of 1850, it did not make the fare fixed by that agreement a matter of statutory enactment—it did not make the fare “allowed by law,” in the language of the penal act of 1857—it was still a fare regulated by contract. The act confirming the contract says nothing about fare—it leaves that as found and provided for in the resolutions and contract between the city and the company. It made valid, if you please, a voidable contract, and gave legislative sanction to all its provisions, that of fare included.

It follows, from all that has been said, that the fare of these defendants is regulated, not by the act of 1850, as claimed by the complaint in this action, but by the agreement with the city corporation; and it equally follows that the act of 1857 has no application to these defendants. Therefore, the penalties claimed in this action cannot be enforced. There is an exception taken by the defendants to the complaint, in this, that in no count does it allege that the plaintiff informed the conductor, on entering the car, how far he was going, or that he objected to pay the six cents. This exception is well taken, but after what I have said above, it is not necessary to discuss the proposition.

The remaining question, the one submitted without argument, was whether, under the circumstances, these defendants had a right to receive the extra cent from passengers. Compacts, by whomsoever entered into, should be kept; that men and companies are equally bound by such, is self-evident; but it is also evident that if one party performs not his part, the other is released from the performance of his. This is a proposition no being can dispute. Justice, right, and reason require it, and the law of nature commands it.

But extraordinary occasions may now and then occur,

in which the happiness of the people may be better promoted by acting for the moment in opposition to the law than in strict observance of it.

Here an occasion did arise—a crisis, it would seem, that could not be avoided. And although the interests of this company were but a mite, as it were, in the great drama enacted, yet they were completely drawn into its vortex, they suffered by its effects, and had to do as all other corporations did in the emergency—sustain themselves as best they could.

The calamities of a civil war broke upon the country; its people and territory were for a time divided; foreign nations looked upon that division as final and permanent, and as for asking credit abroad under the circumstances it was simply preposterous. Something had to be done to save the institutions. A scheme was therefore adopted; and although it upset, in the minds of some, many of the old notions of statesmen and constitutional lawyers, yet it was a complete success; for it carried a people through the most fearful ordeal that ever a nation was subjected to, without being dependent on any other power for the credit of a single shilling. The measure that benefits most a country, and tends to elevate and make its people great and happy, when it does not invade or encroach on the rights of other nations or other people, will always be deemed constitutional, whether it is in accordance with the written instrument or not; and future ages, viewing it in the light that those means are the most correct which best accomplish the end, will declare it constitutional because of its success. In other words, I deem that constitutional which benefits the nation, and of which the whole people approve. No law can have much effect which is not backed by the general conscience of the community; and it is for the want of such backing, that fanatical and partisan laws are often disregarded.

I will say here that the scheme resorted to does credit to the intellect that conceived it, and it does infinite honor to the mass of the people who accepted and were satisfied

with its terms for the time being, as the only method to save the country from ruin.

At the time this company received its grant, there was nothing but specie received as fare, and it was upon such a basis they obligated themselves to build the road for the accommodation of the public.

In the necessity of the moment, the general government passed laws creating paper currency, the effect of which was to withdraw coin as a circulating medium, and make it an article of merchandise only, and to substitute the created currency; and the five cents which the company charter enabled them to levy from passengers was enhanced in value to twice that sum in paper. The consequence was, that passengers declined to pay in coin; and this company, when they saw they could not obtain pay in that form, advanced their demand to six cents in paper.

Now mark you, this was done, if you please, to save the company from bankruptcy, but it was also to enable them to run their cars so as to accommodate our rapidly growing community. Under the circumstances, they were justified in the course they pursued.

In the ordinance conferring this grant there is a promise required of the company to carry passengers for a certain price, and the consideration for that promise was, that the grantees could levy five cents, in coin, from each passenger so carried; and I cannot find, in the papers before me, that they violated that promise by refusing to receive the fare in specie. On the contrary, it is before me that the public, under the pressure of the moment, compelled this company to receive in payment, instead of five cents, in coin, to which they were entitled, a paper currency that was not equivalent at any time to the original fares fixed in their charter.

It is urged that the law of Congress (1864) allowing this company to add the extra cent under the revenue laws, is not constitutional. I do not agree in saying so. Moreover, I hold that companies, under the circumstances, have just as much right to add the extra cent to their fare

to enable them to cover the tax imposed by the general government, as the landlord has to raise his rent, or the merchant to increase the price of his commodities for the like purpose. And I will say more, that when we return to a gold and silver basis, and legal minds get running again in the constitutional groove, if the law which creates this paper currency is discussed in connection with that allowing them to charge the extra cent, the one will be found to be equally as constitutional as the other.

These views may not accord with the clamor raised sometimes against railroads or corporations, but the ex-ecutors of the law should at all times be so far masters of their opinions as not to allow their minds to be warped by every gust of passion which may overbear, for a moment, the reason of the people. I am satisfied, and do maintain, that if Congress had a right to create the currency, and make laws enabling it to pass for money, and that was the cause of depriving the railroads of the five cents in specie, they, in return, had an equal right, under the circumstances, and without the aid of the law of 1864, to require the one cent extra. Nay, more, I hold that in all fairness they have as good a right to exact the full equivalent in paper money for the five cents in coin which their charter guaranteed them, as the general government has to sell gold coin by the million for double its value in greenbacks. I, therefore, cannot join in this hue and cry against railroads, when, perhaps, they are doing all in their power to accommodate our citizens. Certain it is that these companies have added largely to the wealth of our city, by affording its people ready access to all its parts, enabling them to reside on our island, thereby increasing the value of its property. The good done in this way is often forgotten, and our people are frequently misled by designing persons, who carp against corporations from selfish motives.

Now, in this case, I do not intend to mislead. On the contrary, I shall be plain, so that all can understand; and that there may be no bickering and breaches of the peace between the employees of companies and the

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passengers, until this question is disposed of in the court of last resort, I hold—

1st. That when the company secured its charter, it was with the tacit understanding they could charge five cents in specie, that being the currency then.

2nd. That an extraordinary crisis arose, compelling the general government to issue a paper currency, which enhanced the value of the original fare, and that they were justified in advancing one cent when paid in paper.

3rd. That the law of Congress, passed 1865 (13 *U. S. Stat. at L.*, 485), justifies the companies in adding the additional cent to the fares, even if the paper currency had not depreciated the original fare; and that passengers are bound, if they wish to ride by these cars, to pay such additional cent.

4th. That the penal act of 1857 does not apply to city railroad companies; and that, by operation of law, the penalty sought for here cannot be recovered.

Judgment must, therefore, be entered for the defendants, overruling the demurrer with costs.

THE BROOKLYN CITY RAILROAD COMPANY *against* FUREY.

Supreme Court, Second District; Special Term, Dec., 1867.

ACTION.—SUMMARY REMEDIES AGAINST NUISANCES.

A municipal corporation authorized to make ordinances for the purpose of regulating city railroad cars, prohibiting nuisances, and preventing and removing obstructions on the streets, is not thereby authorized to interfere, at a specific point, with the tracks or business of a railroad which is established and conducted under a legislative grant.

The question whether the tracks and arrangements of the company are within the authority granted by the legislature, is not to be determined

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summarily by the officers of the corporation, under ordinances giving them supervision of the streets, and power to prohibit and remove obstructions, but must be determined by a legal or equitable remedy.

Motion to continue preliminary injunction.

This action, with three others, was brought by the Brooklyn City Rail Road Company, against Robert Furey, the street commissioner, and the corporation of the city of Brooklyn, to restrain the commissioner from interfering with the tracks and turnouts of the plaintiffs' road, situated at the foot of Fulton-street, in that city. It appeared that the plaintiffs, who were the proprietors of a horse railroad had, for the accommodation of their business, constructed at the foot of said street, which was also one of the termini of their road, several lines of tracks to the number of eight or more, and upon these tracks the company's cars were constantly kept standing. Extra lines of track had been laid for similar purposes, upon the public wharf, extending down to the bulkhead of the pier, in such a manner as to obstruct the wharf for general business. An injunction was granted to prevent the street commissioner from interfering with the tracks, and the company now asked to have it made perpetual. Other facts are more fully stated in the opinion of the court.

G. T. Jenks, for the plaintiff.

A. McCue, corporation counsel, for the defendants.

GILBERT, J.—This case involves the question in what mode, and to what extent, the exercise of the franchise of running horse cars, upon the streets of the city of Brooklyn, under legislative authority, is subject to municipal regulation and control.

The charter of said city grants to the common council thereof, power to make ordinances for the following, among other purposes, namely: 1. To license and regulate railroad cars. 2. To prohibit and abate nuisances. 3. To prevent and remove obstructions in and upon the streets, &c. (*Charter*, tit. 2, § 13, subd. 4, 9, 17). This

enables the common council to protect the public interests of the city, and the proper security of the persons and property of its inhabitants, by preventing the use of the public streets in any way incompatible therewith. But the object must be accomplished by general rules or laws. The power is one of legislation merely, and it cannot be summarily enforced against any apparent legal right (*R. R. Co. v. Buffalo*, 5 *Hill*, 211). The ordinances on this subject passed by the common council, confer upon the defendant Furey, as street commissioner, supervision over the streets (Art. 3, § 1), and prohibit the obstructing or incumbering any street, and authorize the removal of such obstructions (Art. 3, § 11; Art. 6, § 1). The latter ordinance provides, that it shall not be construed to prevent loading or unloading of passengers from any public or private conveyance, or of vehicles waiting a reasonable time for that purpose. This proviso, however, is only of minor importance in determining the claim of power set up by the defendants.

Under the statute and ordinances cited, the defendants claim the right and authority to act summarily, and without legal process, to prevent the plaintiff from using certain tracks, laid down by them at the termini of their several routes adjacent to the Fulton Ferry, on the ground that they are superfluous, and unauthorized by the legislative act under which they hold and exercise their franchise, and also, to compel the departure of their cars without waiting to take up passengers arriving by such ferry, and also to compel the plaintiffs to change the position of their switch or turn-table at the terminus aforesaid, because it is so near the dock, at the foot of Fulton-street, as to render the use of such dock dangerous.

The plaintiffs on the contrary claim the right, and insist, that it is their duty to exercise the privileges and powers, thus assailed, under the aforesaid legislative grant.

The existence of this grant is not disputed. The only question in the case relates to its scope and effect. Upon this subject this court held, at general term, in the case of

Central R. R. Co. v. Brooklyn City R. R. Co., that the effect of section 2 of the act of Mar. 23, 1864,—whereby the plaintiffs were authorized “to construct and operate their railroad over the several routes mentioned in their articles of association,”—was to relieve the company from all dependence upon the common council of the city, for leave to lay down its tracks upon the streets of the city, mentioned in their articles of association, if such consent had not been previously obtained (32 *Barb.*, 363).

The summary power asserted by the defendant is essentially judicial. The pretension is, certainly, a novel and extraordinary one. To sustain it, would certainly weaken the constitutional guaranty which protects private property against deprivation, without due process of law.

I am of opinion, that the defendants are mistaken in respect to the nature and extent of the powers on this subject with which they have been vested. It is not necessary to define the limits of such powers. It is sufficient to say, that this railroad, being authorized by law, is not *per se* a nuisance, and that, whether the tracks and appendages thereof, which it is alleged are illegal, have been duly constructed under the authority of the legislature, or are a necessary incident to the franchise granted, are, to say the least, legal questions, which the defendants have not a right to determine summarily in the exercise of a power to abate nuisances, and remove obstructions from streets. They cannot make a thing a nuisance by declaring it to be so, nor can they, in the exercise of the power of regulation, materially impair, or affect the franchise actually granted by the legislature (*Davis v. The Mayor*, 14 *N. Y.* [4 *Kern.*], 524; *State v. Jersey City*, 5 *Dutch.*, 170). If the evils and abuses which they allege exist, the courts are open to redress them, and they must in executing the public trusts confided to them, seek some legal or equitable remedy.

The motion to continue the preliminary injunction, therefore, is granted with \$10 costs.

ORCHARD *against* BINNINGER.*New York Common Pleas, Special Term; August, 1868.*

SECURITY UPON APPEAL.—DISCHARGING LIEN OF JUDGMENT PENDING AN APPEAL.

An application by a judgment debtor to have his real property exonerated from the lien of the judgment, pending an appeal on which he has given security, is addressed to the discretion of the court, and this discretion is to be carefully exercised for the protection of the creditor.

In this case the court required the execution of a specific lien upon real estate of sufficient value to cover the plaintiff's demand.

Motion to have judgment docket marked "secured on appeal."

This action was brought by Samuel Orchard against Abraham M. Binninger, Dexter B. Britton and James E. Brown. The case was tried in January, 1864, and a verdict rendered for the plaintiffs, upon which judgment was duly entered February 2, 1864, for \$17,093.55. The defendant now moved to have the docket of the judgment marked "secured on appeal." In support of this motion he showed by affidavits of D. B. Britton, one of the defendants, that judgment was obtained against the defendants Binninger and Britton (Brown not being served with process), and docketed February 2, 1864; that the appeal was taken and perfected, and requisite security given to stay execution; that the sureties on the undertaking were Clark C. Wilson and John S. Christie, who justified; that the defendant is worth \$50,000 and over; that Binninger is possessed of large wealth; that exceptions hereunto have been recently settled, and that the appeal is still pending, but has not been argued; that Binninger is absent from the city, and that an application for a loan of money upon the premises on which the said judgment stands as

an apparent lien is now delayed by reason of the omission to have the judgment docket marked secured on appeal. The affidavit of Wilson was also read, in which he stated that he owned \$36,000 worth of real estate; and the affidavit of Christie, the other surety, was also produced, which stated that the deponent was worth \$10,000 in real estate and \$36,000 over and above his liabilities.

The affidavit of Luther R. Marsh, read in opposition, alleged that the defendant appealed from the said judgment February 20, 1864, notice of appeal being duly served on the plaintiff; that the proposed case was served and service of amendments returned; that the case and amendments were submitted to Judge DALY for settlement; but he refused to settle them on the ground that the original request to charge, with his rulings thereupon on the margin, were not furnished—that he had been unable to procure it from defendants' attorney or stenographer; and at last, after four years from the time of submission of the case and amendments, Judge DALY directed notice for application for settlement to be given to the defendants' attorney for April 29, 1868. At such time the missing document was furnished,—and although four and a half years have elapsed from entry of judgment herein, the deponent had not been able to procure argument at general term of appeal from said judgment. The lien of said judgment will expire in about five and a half years more, and before the cause could be heard in the court of appeals, even if appeal should be taken at once; and that the lien would therefore be of no practical security to plaintiff, but he would be obliged to rely upon present security of the defendant and his sureties eight or nine years hence.

Marsh, Coe & Wallis, for the plaintiff.

S. E. Church, for the defendant.

BRADY, J.—The judgment obtained in this action, with accumulations of interest, amounts to a sum exceeding \$20,000. The sureties on the appeal to this court justify in \$36,000, which is not double the amount of the judgment.

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ment and interest ; and the defendant Britton swears that he is worth \$50,000 over and above all his debts ; and that the defendant Binninger is " possessed of large wealth." This would seem to be ample security for the judgment, but the defendants will be enabled to sell all their real estate, if the judgment be marked secured on appeal, and an ordinary business vicissitude would sweep away the balance of their estate. The latter observation applies to the sureties, who are gentlemen engaged in mercantile pursuits, and subject to the revolutions in trade and fluctuations in values which absorb large sums of money. It cannot be said that substituting such securities for liens upon real estate gives perfect security to the judgment creditors, which is the design of the law ; and, unless the substituted security approximates to the one existing, it ought not to be accepted. The legislature intended, it is true, that the appellant should have all the advantages of an appeal which would be a presentation to and consideration of his case by the full bench in all the courts by which it could be heard, and immunity from the burden of the judgment *ad interim* ; but they left the latter advantage to the discretion of the courts, inasmuch as the payment of the judgment might be jeopardized unless such discretion was carefully exercised for the protection of the creditor. There is greater safety in a multitude of sureties, considering the vast changes of fortune which distinguish business life, and that multitude approximates more to the value of a lien on real estate than a few sureties. The doctrine of chances is decidedly in favor of a creditor who has several sureties for his claim.

The order to be made, therefore, on the motion, will be :—

Motion granted, on the defendants furnishing two sureties who will justify in \$30,000 each, in addition to those who have signed the undertaking, upon executing a specific lien upon their real estate, or having a specific lien executed on real estate sufficient in value,—that is \$30,000,—to protect the plaintiffs to the amount of their claim, and interest and costs.

VALENTINE *against* LLOYD.

New York Common Pleas ; Special Term, December, 1867.

COMPLAINT ON DEBT FOR NECESSARIES. — MISJOINDER
OF CAUSES OF ACTION. — LIABILITY OF WIFE'S
SEPARATE ESTATE.

Under the act of March 20, 1860 (*Laws of 1860, 157, § 1*),—which exempts the separate property of a married woman from liability for debts of her husband, except such as may have been contracted for support of “herself or her *children*,”—it is not sufficient to allege in the complaint in an action to charge her estate, that the debt was contracted for the support of herself and her family.

An action to reach the separate estate of the wife, in a case within the act, should be special, seeking that relief only; and it is not competent to join both husband and wife, and ask a general judgment against both, as well as an execution against her separate estate.

Demurrer to complaint.

This action was brought by the plaintiff, Peter J. Valentine, to recover of the defendants, James I. Lloyd and Ella his wife, the sum of two hundred and eighty-three dollars and eighty-two cents for provisions claimed to have been furnished and delivered to the defendants at the request of the defendant Ella Lloyd, the wife. The complaint alleged that such provisions were necessary for the support of said “*Ella Lloyd and her family*,” that the defendant, Ella Lloyd, promised to pay for said provisions, that the said Ella is seized and possessed in her own right of a separate estate. The complaint asked judgment against the said defendants, and that the separate estate of the wife might be sold under execution on the judgment.

The defendants separately demurred to the complaint. The grounds of demurrer were that several causes of action had been improperly united, to wit—an alleged cause of action against the defendant, Ella Lloyd; to charge her

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separate estate, with a cause of action against her husband individually. Also, that the complaint did not state facts sufficient to constitute a cause of action as to either defendant, and especially as to the defendant Ella Lloyd, so as to *bind her separate estate*.

Pinckney & Spink, for the plaintiff.

S. V. R. Cooper, for the defendant.

VAN VORST, J.—The husband is bound to provide his wife with necessaries. He is under a legal duty to support his family, and he is liable for what is necessary to this end. The moral and legal obligations are here coincident. And if the wife contracts debts for necessaries for herself and her children, during coverture, the husband is obliged to pay them. His assent to the purchase is presumed.

Whether this liability arises solely out of the marital relation, and the duties and obligations which spring from it, or whether the wife, in creating the liability, acts as *his agent*, the legal consequences to the husband are the same. He is the contracting party, and it is difficult to see how the wife can be made liable in an action against her founded on her husband's obligation.

Yet that is sought to be done in this action. The merchandise, it is said, was delivered to the defendants, and was necessary for the support of the wife *and her family*. Clearly this was the husband's duty to provide for. It was his debt, and the wife is no more liable to pay it than she would be to assume and discharge any other obligation of her husband.

But it is claimed that the act of March 20, 1860, makes her separate estate chargeable for this debt.

This act provides that the separate property of a married woman shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or *her children*," by her, as his agent (*Laws of 1860, 157, § 1.*) This act does not, in terms or by implication, disturb the legal relation of the husband to the contract

for necessities ; it does not make her separate estate so chargeable, on the ground that it is the debt of the wife. but because it was contracted by her as the "agent of her husband," *for the support of herself or her children*, This act still regards it as his debt.

It is not averred in the complaint that the provisions were necessary for the support of "her children," or even that she has any children to be supported. The articles were necessary, as it is claimed, for the support of herself and *her family*. A family is "the collection of persons who live in one house and under one head or manager" (*Webst. Dict.*). It by no means follows that there are children in the body, and the word "family" certainly embraces the husband, domestics, and lodgers or boarders. The act of 1860 does not seek to charge the separate estate of the wife for the support of her husband, domestics, or boarders of the family.

It was improper, therefore, in this case, to join the wife with the husband as a contractor of the debt. She is not personally liable for its payment, nor do the facts set forth in the complaint render her separate estate chargeable for the plaintiff's claim.

But I am of the opinion that if her separate property was liable, it could not be reached in a suit of this character, in which a general judgment is demanded against both parties. Were the facts of this case such as the statute points out, the proceedings to reach the wife's property should be special, and limited to that relief only. It should be an equitable action. Nor do I think that in any suit or proceeding, the separate property of the wife, who acted merely as the "agent" of the husband in contracting the debt for which he himself is primarily liable, should be taken, if the principal is able to respond. I think it would be most inequitable to allow a resort to the wife's separate estate in the first instance. There is no allegation in the complaint that the husband, who evidently participated in the use of these provisions, is unable to pay his own debt. There is no averment that he has no property out of which the claim may be fully sat-

isfied. It is true, there is an allegation in the complaint that the wife promised to pay this debt. When the promise was made is not stated, whether at the time the debt was contracted or subsequently ; nor does it appear how or in what form she so undertook. I do not think that such promise, if made, would create a cause of action against her, nor that she could be sued on such an undertaking simply. A married woman has no separate existence or capacity to contract generally, so as to be sued at law on her obligation, either with or without her husband. Her husband and herself are one person. The wife can not contract, or be sued at law for necessaries even, and he who trusts her relies on her honor only (*Chitty on Cont.*, 168, 169, and cases cited ; *Yale v. Dederer*, 18 *N. Y.*, 265 ; *S. C.*, 22 *Id.*, 450 ; *Ballin v. Dillaye*, 37 *Id.*, 35). The court cannot make a personal judgment or decree against her for the payment of a debt. If the promise was made after the debt of the husband was contracted, then would prevail against it the objection that it was made to answer the obligation, default, or miscarriage of another, and, to be effective, should be in the form authorized by the statute of frauds. The claim to have this demand satisfied out of her separate property, under the act of 1860, is not based on the obligation being of the wife's contracting, but on the fact that it is the husband's debt, contracted by her as his agent.

The demurrer is well taken, both as to there being a misjoinder of causes of action, and on the ground that the complaint does not state facts sufficient to charge the separate property of the wife.

Judgment for the defendants on the demurrer.

THE PEOPLE, *ex rel.* RAYMOND, *against* CONNOLLY.*Supreme Court, First District; Special Term, July, 1868.*

SETTLEMENT OF ACCOUNTS AGAINST THE CITY OF NEW YORK.—MANDATORY STATUTES.

The act of 1868 (2 *Laws of 1868*, 2022, ch. 853, § 7.)—which declares that the comptroller of the city of New York “is authorized, in order to save expense of litigation and interest,” to adjust any claim on which suit is brought against the city, “and when adjusted, to duly provide for its payment,”—is mandatory in respect to providing for payment after such an adjustment of the amount has been had.

A mandamus may issue to compel the comptroller to provide for payment of a claim which he has adjusted under the act.

Motion for a mandamus.

This proceeding was taken by Henry J. Raymond and George Jones, proprietors of the New York Daily Times newspaper, against Richard B. Connolly, comptroller of the city of New York, to recover for advertising to the amount of \$25,064.92, done for the corporation of the city of New York, between January 1, 1864 and June 1, 1868. And the plaintiffs now moved for the issuing of a mandamus to the said comptroller, commanding him to adjust the plaintiff's claim and provide for the payment of the same, pursuant to the provisions of section 7 of the act of June 3, 1868, ch. 853. In support of this motion the affidavit of George Jones, one of the plaintiffs, was read, which stated that the said claim was duly presented June 1, 1868, to the comptroller for adjustment; that upon the expiration of twenty days a second demand was made upon him for adjustment; and that, the comptroller neglecting such payment, suit was commenced by service of process upon him, against the mayor, aldermen and commonalty of the city of New York. It also appeared that,

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subsequent to the commencement of said suit, the comptroller, upon application, admitted the legality and correctness of the account, and adjusted the amount, but refused to pay the same or provide for such payment.

The provision of the act of June 3, 1868, ch. 853, which was relied upon by the plaintiff (the act to make provision for the government of the city of New York, 2 *Laws of 1868*, 2022, § 7, latter clause), is as follows :

“Whenever any claim is put into suit against the said mayor, aldermen and commonalty, the said comptroller is authorized, in order to save expense of litigation and interest arising on said claim, to adjust the same, and when adjusted, to duly provide for its payment, and on payment, to obtain and file full releases and acquittances from claimants.”

On July 22, 1868, the plaintiffs obtained an order requiring the comptroller to show cause why a writ of mandamus should not issue.

Marsh, Coe & Wallis, for the motion.

Richard O'Gorman, corporation counsel, opposed.

CARDOZO, J.—The authority vested in the comptroller by section 7 of the act of June 3, 1868, is an *imperative* authority, which he is bound to exercise. It has been from early time a well-settled principle, that a power and authority conferred on a public officer, and relating to a public duty, is *mandatory* (see *Mayor, &c. of N. Y. v. Furze*, 3 *Hill*, 612).

The question in that case arose under an act which provided that it *should be lawful* for the mayor, &c., to do certain things relating to sewers, &c. Chief Justice NELSON said, “This statute is one of public concern, relating exclusively to the public welfare ; and though permissive merely in its terms, it must be regarded, upon well-settled rules of construction, as imperative and peremptory upon the corporation. When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it.

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The exercise of the power becomes then a duty which the corporation are bound to fulfill.

In *Wilson v. Mayor &c.*, of New York (1 *Den.*, 595, 600), the court say, "Although the language of the statute which confers on the defendants power to make sewers and drains is that of permission and not of command, yet in its nature it is plainly imperative (3 *Hill*, 614). It is equivalent to an express enactment that it shall be the duty of the mayor, aldermen, &c., to make all needful sewers and drains in said city."

In *Hutson v. City of New York* (5 *Sandf.*, 289), the court quotes from the case in 3 *Hill*, the following among other remarks, "The inference deducible from the various cases on this subject seems to be that where a public body or officer has been clothed by statute with *power* to do an act which concerns the public interests, or the *rights of third persons*, the execution of the power may be insisted on as a duty, although the phraseology of the statute be permissive merely, and not peremptory."

In 9 *N. Y.*, 163, the court of appeals affirm the last mentioned decision.

In *The People v. Supervisors of New York* (11 *Abb. Pr.*, 114), the general term of this district held to the same effect. There the tax levy "*empowered*" the supervisors to raise a sum not exceeding \$80,000, to pay amount due to the contractors with the commissioners of record, and "*authorized*" the comptroller to pay the amount. Judge SUTHERLAND, at special term, granted the mandamus, commanding the supervisors to exercise *the power* thus conferred upon them; holding that the statute made it the *duty* of the board of supervisors to raise the amount by tax; and this decision was affirmed at the general term; the court holding that "the act is imperative, leaving no discretion in the defendants whether they will exercise the authority conferred. Although the language of the act is *simply enabling*, yet, as it confers a power which concerns the public as well as individuals, it is not merely permissive, but is mandatory."

Indeed, this rule is so well settled that it seems almost

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superfluous, at this late day, even to refer to the authorities, which are familiar to every lawyer.

The mandamus must issue.

FISK *against* THE CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY.

Supreme Court, First District ; Special Term, April, 1868.

JURISDICTION.—FOREIGN CORPORATIONS.—CONFLICT OF LAWS.

The supreme court of this State has jurisdiction of an action brought by a citizen of this State against a foreign corporation in which the plaintiff is a stockholder, to restrain illegal acts of the directors, when they are personally within the jurisdiction of the court.

The acts, *ultra vires*, of a foreign corporation, which is a creature of the laws of two different States, are not made valid by a confirmatory statute enacted by the legislature in one only of such States.*

An injunction against the directors of a corporation, who are charged with issuing illegal stock in excess of the actual capital, should not extend beyond the transaction in question, and enjoin dealings in the genuine stock, unless special necessity for such interference be shown.

Motions for receiver ; and counter-motions to dissolve injunctions.

Four actions were brought against the Chicago, Rock Island & Pacific Railroad Company, and others ; one by James Fisk, Jr., and others ; the second, by Hatch ; the third, by Fanshawe ; and the fourth, by Belden.

The plaintiffs in these several cases sued as holders of original shares of the stock of the Chicago, Rock Island & Pacific Railroad Company, a corporation created by the States of Illinois and Iowa. The complaints alleged

* Compare *O'Brien v. The same defendants*, *post*, 381.

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that a new issue of 49,000 shares of stock was illegal and void, and demanded injunctions against the use of the proceeds of that issue, and the appointment of a receiver of such proceeds.

Motions were made by the plaintiffs for the appointment of such receiver; and motions were made by the defendants to dissolve the pending injunctions against the use of the proceeds. All the motions came on to be heard together.

D. D. Field, J. E. Burrill, and J. K. Porter, for the plaintiffs.

C. Tracy, W. Fullerton, A. J. Vanderpoel, and J. N. Whiting, for the defendants.

CARDOZO, J.—I shall not follow the counsel over the extended field of discussion in which they indulged on the argument of the motion in these cases. The statement of a very few plain and well-recognized propositions is all that is necessary to dispose of the question really involved. My views may be briefly expressed, as follows:

1. Even if my reflection and examination led me to a different opinion, which they do not, I should not feel at liberty to deny the existence of the jurisdiction which it is sought to have the court entertain in these actions, since the point has been fully and distinctly decided by the general term of this court in *Griffiths v. Scott*, cited in the argument. My views accord with that decision, but, in any event, I should consider myself bound to follow it. In that case Judge INGRAHAM said: "I think there can be no doubt but that a citizen of this State can maintain an action against a foreign corporation for any cause connected with the recovery of or protection to his property or rights in said corporation. Judge LEONARD, in the same case, held that this court "has not the power to remove or appoint the trustees or directors of a foreign corporation, but it can enjoin their action when illegal, or when acting fraudulently or unlawfully, if they are personally within our jurisdiction." These remarks are apposite to the

present suits, and dispose of the points as to jurisdiction raised by the defendant's counsel.

2. The issue of the 49,000 shares complained of was *ultra vires*. Neither the corporation nor its directors had, in any view, the right to make certificates purporting to represent capital stock, which had not in fact been subscribed and paid for, and to put them on the market as stock and sell them below par. If they might do so, and sell them at a discount of 1 or 2 per cent., they might sell them at 50 per cent., or any greater discount. It is not a question of good faith, or of honest intention, or of wise policy, or skillful or discreet management upon the part of the directors; it is a question of power. Every paper issued purporting to represent stock which had in fact no existence, was a false certificate; and the directors were not authorized to make false certificates. No such power attaches to their office, and the stockholders have the right to complain that they have assumed a power which was not conferred upon them. These views are controlling of the case, and are so familiar that they do not require the citation of authorities to support them.

3. The statute passed by the legislature of Iowa (*Laws of Iowa*, 1868, ch. 13) cannot alone ratify the act of the directors. The State of Iowa has not exclusive jurisdiction over this corporation. The certificates do not purport to represent stock in the original corporation created by the State of Iowa, but assume to represent stock of the consolidated company consisting of that corporation and the one formed under the laws of Illinois. The latter State, therefore, has quite as much control of the present matter as the State of Iowa. Certainly the act of either alone will not aid the defendants.

4. I see no reason why any injunction should have issued to restrain the defendants, except so far as the 49,000 illegal certificates are concerned. The transfer of the illegal issue was properly enjoined, and the proceeds should be held by the court to protect the company against damages in favor of the holders of the false certificates, or to enable it to retire them; but nothing is

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disclosed in the papers which satisfies me that it is either proper or necessary to prevent dealings in the genuine stock or to interfere with the business of the corporation, except to the extent I have mentioned.

5. Respecting the motions to attach the defendants, I have only to remark that I do not think that any breach of the injunction has been established by the affidavits submitted to me, calling for any present action.

6. I shall appoint Hugh Smith, Esq. (the deputy city chamberlain), receiver of the proceeds of the 49,000 illegal shares, requiring from him a bond with surety, to be approved in \$500,000, and directing that each half million of dollars which shall come to his hands as such receiver, shall be deposited alternately in the United States Trust Company, and in the Union Trust Company.

7. The costs of these motions will be costs in the actions, and abide the event of the same.

8. An order in accordance with these views, and containing such provisions as may be deemed necessary to carry them into effect, will be prepared by the plaintiffs' attorneys and presented to me for settlement.

Ordered accordingly.

O'BRIEN *against* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

Supreme Court, First District ; Special Term, Aug., 1868.

FOREIGN CORPORATIONS.—CONFLICT OF LAWS.

In an action drawing in question the powers of a foreign corporation, the powers are to be determined by the law of the States by which the corporation was created ; and acts are to be deemed by the courts of this State as valid which are so by such foreign law, though they would be held without the power of the corporation by our law.

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Motions for a receiver ; and counter-motions to dissolve injunctions.

Three actions were brought against the Chicago, Rock Island and Pacific Railroad Company and others, by O'Brien, Musgrave and Gates, respectively.

The plaintiffs in these cases sued as holders of the original stock of the Chicago, Rock Island and Pacific Railroad Company, a corporation formed and existing under the laws of Illinois and Iowa. The complaints were substantially like those of the previous cases of Fisk, and other plaintiffs, last above reported (p. 378). The plaintiffs in the present actions now moved for the appointment of a receiver of the proceeds of the 49,000 new shares of stock issued and sold by the executive committee of the company. The defendants also moved to dissolve the preliminary injunctions restraining the use of such proceeds.

It now appeared, among other things, that the former suits had been discontinued ; that the legislature of Iowa had passed an act fully confirming the issue of the 49,000 shares of stock ; and that the supreme court of Illinois, in an action brought by the attorney-general of Illinois against the company, had decreed that such issue was legal and valid, and also that, while the former suits were sustained by the petition of a majority of the stockholders, the present suits were opposed by a large majority, about three-fourths in amount, of all the stockholders. All the motions were heard together.

G. W. Wingate, E. W. Stoughton, and L. R. Marsh,
for the plaintiffs.

C. Tracy, and W. Fullerton, for the defendants.

CARDOZO, J.—If these cases presented only similar circumstances to those which existed when the cases of Fisk, Fanshawe and others (which have since been discontinued) were decided, of course I should make the same dispo-

sition of them as I did of those cases, my confidence in the accuracy of the views I then expressed not only being undiminished, but being sustained by the unanimous judgment of the general term.

The corporation defendant here is subject to the jurisdiction of the States of Iowa and Illinois, and by the laws of those States its powers must be tested. The former State had ratified the action of the defendant when the other cases came before me; and now a decision of the courts of Illinois, which I feel bound to respect as an authoritative exposition of the law of that State, is cited, showing that the acts of this corporation, though they would not be within its power according to our law, are so according to the law of the State of Illinois. No decision of that State bearing upon the point existed when the other cases were argued. This puts the present applications in an entirely different position from that which the previous cases occupied, and necessitates that the injunctions should be dissolved, and the motion for receiver denied—a conclusion which I reach the more willingly, from the circumstance that a large proportion of the stockholders, instead of, as on the argument of the previous cases, asking that the injunctions be continued, and a receiver appointed, now elect to ratify the acts of the corporation and its officers, and ask that the injunctions be dissolved.

The motion for receiver must be denied, and the injunctions vacated without costs; and under the circumstances, the plaintiffs must have leave to discontinue these suits without costs, if they desire.

The vacating of the injunctions will render any action upon the petition in the cases of Fisk, &c., unnecessary.

RUSSELL *against* WINNE.*Court of Appeals; January Term, 1868.*SHERIFF'S SALE. — ESTOPPEL. — CHATTEL MORTGAGE,
VOID IN PART, WHOLLY VOID.

A mortgagee of chattels, who, on their being seized on execution against the mortgagor, obtains a postponement of the sale by stipulating with the sheriff that he will take care of the goods, and produce them at the day of sale, and will not meantime interfere with them by virtue of his mortgage, is not thereby estopped from suing the sheriff for seizing and selling the goods.

After the designation of specific goods in a chattel mortgage, the words "and all other goods and chattels now in my store at," &c., are sufficient to embrace all the goods of the mortgagor in the store at the time.

An agreement by the mortgagee of chattels, in favor of the mortgagor, that the latter may sell for his own benefit, and as his own, portions of the property covered by the mortgage, renders the mortgage fraudulent and void; and it should be so pronounced by the court, without submitting the question of intent to the jury. The rule is the same, whether such agreement be contained in the mortgage, or is evidenced by the acts of the parties.—*Per* GROVER, J.

A chattel mortgage which is fraudulent as to creditors by reason of such an agreement as to part of the property, is void as to all the property embraced in it.

Appeal from a judgment.

This action was brought by William F. Russell and his co-administrators of the goods and chattels of Jeremiah Russell, deceased, against Davis Winne, sheriff of Ulster county.

The object of the action was to recover damages of the defendant for the alleged conversion by him of a quantity of stone.

The plaintiffs made title to the stone under a mortgage given to their intestate by one Woodward (who at the time owned the same), to secure the payment of twelve

hundred and thirty-one dollars and nineteen cents, then owing by the latter to the former, payable on demand, with interest, and which described the property mortgaged as follows : " All my flagging, curb and bridge stone, also all my platform, gutter, and coping stones, and all other stones belonging to me, and all other goods and chattels, now in my yard, store and dock, at West Camp, and at Ever Port, and at Saugerties landing, all in the town of Saugerties."

The mortgage contained a clause providing that the mortgagor should continue in possession and the full and free enjoyment of the property mortgaged, until default made in payment of the sum thereby secured. The mortgage was dated January 27, 1862.

The defendant, who was sheriff, made title by virtue of three executions issued upon judgments of the supreme court against Woodward, in June, 1862, and delivered to the defendant, for collection, who levied them upon the stone in question, and also upon the goods in the store, and some other property, and sold the same for the purpose of satisfying such executions. It was proved upon the trial that, at the time of giving the mortgage, the mortgagor was engaged in buying and selling stone ; that he also kept a store with a small stock of goods, which he sold at retail to such customers as called for them ; that he continued, after giving the mortgage, to deal in stone as before ; that he sold some of the stone mortgaged, but whether this was known to the mortgagee did not distinctly appear ; that he also continued to sell goods from the store in like manner as before ; and evidence was given tending to show that this was with the knowledge and assent of, and in pursuance of an agreement with, the mortgagee, and that he continued to apply the proceeds of such sales to his own use, with the like assent and agreement.

It was also proved that, after the levy upon the property by the defendant, the plaintiffs' intestate, to induce a postponement of the sale, gave to the defendant an agreement to the effect that he would be responsible for the property and its production at the time fixed for the sale,

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and that in the meantime he would not interfere therewith by virtue of the mortgage in question.

At the close of the evidence, the defendant's counsel moved to nonsuit the plaintiffs, upon the grounds: 1. That he was estopped by the agreement with the sheriff; 2. That the mortgage was fraudulent and void, for the reason that the mortgagor was allowed to retain and deal with the property as his own; 3. That if the mortgage was fraudulent in part, by allowing the mortgagor to sell the goods in the store, it was thereby rendered fraudulent as to all the property covered by it.

The motion was denied, and the defendant's counsel excepted.

The judge charged the jury, among other things, that the mortgage was void as to the goods in the store, as the mortgage contemplated the sale of these goods. He further charged the jury that this did not avoid the mortgage as to the residue of the property covered by it. To this latter portion of the charge the defendant's counsel excepted.

The jury found a verdict for the plaintiff, upon which judgment was entered by order of the supreme court at general term, before whom the exception was ordered to be heard, in the first instance, and from that judgment the defendant appealed to this court.

P. Cantins, for the defendant, appellant.

John H. Reynolds, for the plaintiffs, respondents.

GROVER, J.—The agreement given by the plaintiffs' intestate to the defendant, upon the postponement of the sale by the latter, was not an estoppel upon the plaintiffs. It merely bound the intestate to take care of the property until the day of sale, and produce it at that time, and in the meantime not to interfere therewith by virtue of his mortgage. There was no agreement by the intestate to abandon his claim to the property, or concession of the right of the sheriff thereto, and of course nothing done by

the latter upon the faith of any such agreement or concession.

The description of the property contained in the mortgage was sufficient to cover the stone, and also the goods belonging to the mortgagor in the store at the time. That description, after fully pointing out the stone mortgaged, proceeded as follows: "And all other stones belonging to me, and all other goods and chattels now in my store," &c., "all in the town of Saugerties." This embraces all the goods of the mortgagor in the store at the time (*Conkling v. Shelley*, 28 *N. Y.*, 360).

This brings us to the question, whether the judge was correct in his charge to the jury, that the mortgage was void as to the goods in the store, as the mortgage contemplated the sale of those goods by the mortgagor, for his benefit.

This question is only material as affecting the validity of the mortgage as to the stone, as there was no claim made by the plaintiffs on account of those goods, although sold by the defendant on the same executions as the stones.

The judge could not have referred to any clause in the mortgage authorizing a sale of the goods, as the clause in the mortgage giving the right of possession and use of the property to the mortgagor was equally applicable to the stone in question as to the goods.

He evidently referred to the proof showing the constant dealings of mortgagor in the goods, selling portions thereof, from time to time, as his own, for his own benefit, with the knowledge and assent of the mortgagee—thus evidencing an agreement that the mortgagor might so deal with the goods.

The judge held that the evidence conclusively proved this, and hence his legal conclusion that the mortgage was void as to the goods, as against creditors. This legal conclusion only need be examined, as the evidence, if not conclusively showing the above facts, tended strongly in that direction, and should have been submitted to the jury, had it not been held conclusive by the court. The question

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then is, whether an agreement by the mortgagee, made with the mortgagor, that the latter may sell for his own benefit, and as his own, portions of the property covered by the mortgage, renders the mortgage fraudulent and void as to such portions? It would seem that the bare statement of the proposition would be sufficient to warrant an affirmative answer. A creditor, for the purpose of securing a debt, has the right to take a mortgage upon chattels from his debtors, and leave the same in possession of the latter, upon assuming upon himself the burden of showing that the transaction was in good faith, and without any intent to hinder, delay, or defraud the creditors of the mortgagor, and by also complying with the other requisites of the statute. If there is an agreement by the mortgagee that the mortgagor may sell or dispose of any of the property for his own benefit, it is established conclusively that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property.

It is evident that, as to such property, the mortgagee not having any real interest therein, such real interest remains in the mortgagor. Why then is the mortgage given upon such property? Evidently, the better to enable the mortgagor to enjoy the benefit thereof at the expense of creditors. Were there no creditors of the mortgagor, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear, that such an agreement shows that the mortgage was not made in good faith, and without a design to hinder, &c., creditors. There is no question of intention to be submitted to a jury. It already appears that as to such property the mortgage was not designed by the parties as an operative instrument between them, and its only operation must be to the prejudice of others. The court should, as to such property, pronounce it void, for the reason that the evidence conclusively shows it fraudulent.

In *Edgell v. Hart* (9 N. Y. [5 Seld.], 213), it was decided by this court that an agreement contained in the mortgage, authorizing the mortgagor to sell the property for his

own benefit, vitiated the mortgage, on the ground of fraud. Surely, the circumstance that the agreement was in the mortgage can make no difference. The effect is precisely the same, whether the agreement is contained in or made separate from the mortgage—whether its existence is proved by writing or otherwise. In all such cases, the inquiry is, did it exist?—and if so, the same judgment as to its effect should be pronounced. In *Wood v. Lowry* (17 *Wend.*, 492), the same doctrine was applied when the agreement was not contained in the mortgage. This case, although overruled by *Smith v. Acker* (23 *Id.*, 653), upon another point, has never been as to the point now in question. The same rule was announced by Judge DENIO in *Gardner v. McEwen* (19 *N. Y.*, 123), although the point was not passed upon by the court. See, also, *Griswold v. Sheldon* (4 *N. Y.* [4 *Comst.*], 581). *Conkling v. Shelley* (28 *N. Y.*, 360) and *Miller v. Lockwood* (32 *Id.*, 293) are not in conflict with, but tend to sustain the rule.

It may therefore be regarded as settled, that an agreement between mortgagor and mortgagee that the former may dispose of the mortgaged property to his own use renders the mortgage fraudulent as to creditors, whether the agreement be contained in the mortgage or not. It would seem to follow, that if such agreement as to the whole property covered by the mortgage avoided the entire mortgage, the same agreement as to a part of the property will avoid it as to that part.

The only remaining question is, whether, if the mortgage be fraudulent as to creditors as to a part of the property mortgaged, it can be upheld as to the residue. As applied to this case, if the mortgage be fraudulent and void as to the goods in the store, is it valid as to the stone? The judge charged that it was, thus sharply presenting the point. In this I think he erred.

The mortgage was one single instrument, given to secure one debt. To render it valid it must have been given in good faith, and for the present purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object in part, or as to

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part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties cannot be confined to one particular parcel of the property. Entire honesty and good faith is necessary to render it valid, and whenever it indisputably appears that one object was to defraud creditors to any extent, the entire instrument is, in judgment of law, void. It is not at all analogous to a class of cases where it has been held that a part of an instrument itself, if valid, and not dependent upon other parts which are invalid, may be enforced. Here the fraudulent design, if it existed, destroys the foundation of the entire instrument. The judge should so have instructed the jury.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

WOODRUFF, J.—I think it entirely settled that if a mortgage be one which, by reason of the fraudulent purpose and intent with which it is executed is declared *void* by statute, it is wholly void, notwithstanding it may include property as to which it would be valid, if it could be regarded as a mortgage of that only. To speak more clearly, if a mortgage be given with the fraudulent intent to cover up and conceal from creditors a portion of the debtor's property, it is altogether void, notwithstanding it also includes land or other property, in relation to which there is a *bona fide* intent to convey it as security for an honest debt, and no other purpose and intent. A mortgage void in part as a violation of the statute, is void altogether (*Goodrich v. Downs*, 6 *Hill*, 439; *Grover v. Wakeman*, 11 *Wend.*, 194; *Fulton Bank v. Benedict*, 1 *Hall*, 480, 546; *Jackson v. Packard*, 6 *Wend.*, 415; *Rice v. Welling*, 5 *Id.*, 595; *Hammond v. Hopping*, 13 *Id.*, 505).

It follows that the instruction of the judge to the jury, that as to the goods in the store the mortgage was void, involved the further legal consequence that it was altogether void.

If, therefore, the appellant is entitled, on this appeal, to insist upon that instruction as the law in this case, he

has a right to claim, that as matter of law, his motion for a nonsuit should have been granted.

If the instruction had proceeded upon the assumption that the defendant had shown, by *extrinsic proof*, that, in respect to the goods in the store, they were included in the mortgage with intent to cover them, and hinder and prevent their being taken by creditors, while the stone was in fact mortgaged in pursuance of a demand for security, and with *bona fide* intent that they should be held for that purpose, and no other, then we could not, on exception, examine the facts to see whether that fraud was sufficiently established. But when it appears that the judge pronounced the instrument void on *its face*, because the mortgage itself "contemplated the sale of the goods in the store," we are at liberty to examine and see whether he gave a correct legal construction to the mortgage, and if not, then, obviously, such instruction by itself did not prejudice the defendant, and we might disregard it, and determine the case on the other question raised. So far from this instruction being of prejudice to the defendant, it was altogether in his favor, because, having told the jury that the mortgage was void as to the goods, he also told them that they might take that fact into consideration in deciding as to the honesty and good faith of the mortgage.

I think, however, that neither the mortgage nor the evidence warranted any such peremptory instruction. A stipulation that, until default, the mortgagor may remain in the full and free possession, and in the full and free enjoyment of the goods, not only is not an authority to sell, but rather excludes such an idea.

No direct proof was given of any express contemporaneous agreement that the mortgagor might sell the goods.

The circumstance that the plaintiff was at the store once after the mortgage was given, and saw, or most probably saw, sales taking place, was at most a circumstance to be submitted to the jury as evidence of such prior

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agreement contemporaneous with the execution of the mortgage.

It was a sale in violation of the rights of the mortgagee, or even if it was consented to after the execution of the mortgage, it would not make the mortgage void; it would do no more than discharge the lien on the goods which he consented might be sold.

But I think that the defendant was entitled to submit to the jury the question, whether it was not, according to the agreement, the intention of the parties that the mortgagor should sell the goods in the store, and appropriate the sales to his own use? And if so, then the instruction requested, that if, for this reason, the mortgage was void as to the goods, it was void also as to the other property, should have been given.

The mortgaged property was left in the possession of the mortgagor. He was a storekeeper, and the goods mortgaged embraced all his stock in trade—"all other goods and chattels now in my store." The mortgagor continued his business, selling goods and buying others, without keeping any separate account of sales of mortgaged goods. He did not pay over the proceeds to the mortgagee. The man whom he employed "traded and got goods after the mortgage was given." The plaintiff when he took the mortgage, did not visit the premises, or take any means of identifying the goods then in the store, so that he might distinguish them from any others which might be purchased by the mortgagor; nor does anything indicate that he did not suppose that the business of selling and "trading" would go on as theretofore; and on the contrary, when he did go to the place, after the mortgage was given, he found the store open, and the clerk in attendance, and does not appear to have made any objection, or even inquiry. If this does not amount to express proof that he thereby knew that sales of the mortgaged goods were in progress, and the business was carried on without any regard to the mortgage, it certainly points strongly in that direction.

Now, I think it clear that if the only issue in this case

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had been, was this mortgage delivered and received upon an understanding, and with the intent, that the mortgagor should continue to deal with the goods in the store as his own; "trading" with them, and selling as opportunity offered, and appropriating the avails to his own use? and the jury had found in the affirmative on that issue, their verdict could not be declared to be without sufficient evidence to support it. If not, then the mortgage, being altogether void, if void as to the goods, for the reason so found, the defendant was entitled to the instruction asked, to have the jury pass upon the question. Upon this ground I think the judgment should be reversed, and a new trial granted.

All the judges concurred in reversing, except MILLER, J., not voting.

Judgment reversed.

WILTSIE *against* EADDIE.

Court of Appeals; September Term, 1867.

REFERENCE.—APPEAL.—EXCEPTIONS.

An exception does not lie to the report of a referee, upon the ground that he has refused to find upon a question of fact other than the issues in the cause.

The court of appeals cannot review a decision of the court below, affirming the judgment of a referee on a question of fact.

Appeal from a judgment of the supreme court in the seventh judicial district.

This action was brought by Thomas Wiltsie against James and William R. Eaddie, alleging that he, the plaintiff, was engaged as a warehouseman, and forwarder on

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the Erie canal, in 1859 ; and that the defendants employed him to receive at his warehouse, and ship therefrom to the city of New York, a quantity of potatoes, for which they promised to pay him a reasonable compensation.

The defendants denied these allegations. The issues were referred for trial. Conflicting evidence was given upon the question, whether the service was rendered by the plaintiff, on his own account, or as administrator of one Butler, and in fulfillment of a contract made between Butler and the defendants.

The referee found for the plaintiff ; and the supreme court at general term affirmed the judgment entered upon his report.

The defendants now appealed to this court.

James L. Angle, for the appellants.

W. C. Rowley, for the respondent.

HUNT, J.—After hearing the testimony produced by the parties, the referee found, as matter of fact, that at the time the potatoes were shipped, the plaintiff was himself engaged in the business of warehouseman and forwarder ; that he received and shipped from the warehouse occupied by him, and for the defendants, thirteen thousand one hundred and twenty-seven bushels, and two thousand six hundred and twenty-five barrels of potatoes.

He found the value of the service, and made his report for the amount due to the plaintiff from the defendants upon this theory of the facts.

The defendants ask a reversal of the judgment, on the ground that the referee refused to find specifically upon the question, whether the plaintiff, before he received and shipped the potatoes in question, had information of the existence of a contract between one Butler, then deceased, and the defendants, for receiving and shipping the same potatoes. The question was sharply litigated before the referee, whether the plaintiff received and shipped the potatoes in question, acting as the administrator of Mr. Butler, or whether it was his individual transaction.

The question was independent, inasmuch as the defendants claimed to have paid Butler, in full, for the same service for which the plaintiff sought compensation in this action. As a fact in a chain of evidence against the plaintiff, the testimony embraced in the question upon which the referee was then asked to find, was obviously material. No complaint is made of the exclusion of the evidence, as it was all received and considered by the referee.

The complaint that the referee has not found specifically upon the question suggested, is not well taken, and for two reasons: First, the referee is required to find and report upon the issues only, and not upon the evidence (*Code*, § 272). He must "state the facts found by him." Thus, he was bound to determine and report upon the question, whether the parties in this action entered into the contract set forth in the complaint. That was a precise issue before him. But he was not bound to say whether he believed the statements of a particular witness, or what his decision would have been if he had believed him, or disbelieved him. He was not bound to "state" whether a particular link in the chain of the evidence of either party existed or was wanting. Such is the character of the complaint now under consideration. As an independent question, it was not of the least importance whether the plaintiff was aware that a contract for the shipment of potatoes existed between the defendants and the deceased. It was only important as bearing upon the question in issue, viz: whether a contract existed between the parties to the action, as set forth in the complaint. The referee has found, distinctly, upon that point, that such a contract did exist. That was, itself, a question of fact; and he further found that the service sued for was not rendered in fulfillment of Butler's contract. He is not called upon to find or explain the means and processes by which he arrived at that conclusion. When the referee decided and "stated that the contract was made between the parties to this action and the service rendered, was in fulfillment of that contract, he decided

and "stated" all that was necessary on that branch of the case.

But again; the question referred to the referee for his decision was a question of fact, and can only come before this court for its consideration, when the judgment of the referee has been reversed on a question of fact, and the order of reversal so certifies (*Code*, § 272). In the present case, the judgment of the referee was affirmed.

If the point of fact which, it is complained, was not decided, had been upon the main issue, it would not have been within our power to review it.

Under such circumstances, we can only review the decision of the general term, when the referee decided without any evidence, or against all the evidence on the point. In the present case, the plaintiff expressly denied any knowledge of a contract between the defendants and the deceased, except as to the potatoes raised on Bullen farm.

Each of these reasons is conclusive against the appellant's claim; and they furnish an answer to the other points of the appellants, to wit: that the referee declined to report whether both parties supposed that Wiltsie was acting in behalf of the estate, and also in relation to the receipt of the \$700, and the application of the same; and also as to what took place on the settlement of the accounts of the plaintiff, and administrator of Mr. Butler.

These are questions of fact, and questions of evidence simply. The referee found that a contract was made between the parties to this action, by the service which was rendered by the plaintiff for the defendants, and which service was rendered by him in his individual capacity, and not as administrator. He properly held that the law implied a promise, from these facts, that the defendants would pay to the plaintiff the value of the service rendered.

The judgment should be affirmed.

All the judges concurred in affirming the judgment.

DOLAN *against* THE MAYOR, &c. OF NEW YORK.

Supreme Court, First District; At Chambers, August,
1868.

INJUNCTION.—CONTRACTS FOR CORPORATION WORK

The common council of New York may be enjoined, at the suit of an individual owner, from entering into a contract to lay a pavement which is patented, and therefore not open to competition, where the work is to be done at the expense of the individual owners of property upon the street.

Motion to continue an injunction.

This action was brought by Peter Dolan to enjoin the Mayor and Commonalty of New York and others from executing a contract for the paving of Seventh-avenue from Fourteenth-street to Fifty-ninth-street, with what is called the Stafford pavement, authorized under a resolution of the common council, passed February 18, 1868.

A temporary injunction was granted by Judge INGRAM, and the case now came before the court on a motion to continue the preliminary injunction.

The principal grounds urged by the plaintiff were, that the right to lay the pavement referred to was held by a corporation under letters patent of the United States, and that it was, therefore, not open to competition, as provided by the statute requiring contracts for the city to be made subject to sealed tenders or proposals for the performance of the work; that the pavement was not desired, but was opposed by the *bona fide* tax-payers of Seventh-avenue, and that the persons who subscribed their names to the petition for such pavement were only temporary

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residents on that thoroughfare, who would not be affected by the assessment; that the laying of the pavement would involve an outlay of \$400,000, or thereabouts, and would be a fraud upon the tax-payers; that the resolution authorizing the contract was procured to be passed by secret agents of the Stafford Pavement Company, and in consideration of certain pecuniary rewards agreed to be paid to the members, or some of the members, of the common council. Plaintiff also contended that the resolution referred to was not duly passed by the common council.

SUTHERLAND, J.—The right to use the Stafford pavement blocks in paving streets is patented, and is held and owned exclusively by a company or corporation.

Of course, there would be no use in advertising for bids or proposals for doing the work under the ordinance in question, for there could be no competition.

According to the reasoning in the case of *Dean v. Charlton* (*Am. Law Reg.*, July, 1868, 564), it follows, that the common council could not authorize the work to be done with or without the form of advertising for proposals, considering § 38 of the charter of 1857, and considering that the work is to be done at the expense of the lot-owners.

The distinction in *Dean v. Charlton*, between it and *Harlem Gaslight Co. v. The Mayor, &c.* (33 *N. Y.*, 309), appears to me to be reasonable, and probably maintainable.

I think, therefore, the injunction should be continued on this ground, without passing upon any other question in the case, with \$10 costs to the plaintiff, to abide the event of the action.

SLOCUM *against* BARRY.*Court of Appeals; January Term, 1868.*

ORDER FOR COSTS AGAINST TRUSTEES.

In an action by trustees, if the complaint alleges a contract made with the plaintiffs as trustees, for the benefit of the trust, the designation of the plaintiffs as such is not to be regarded as merely matter of description, but as showing that they sue in their representative capacity.

In order to charge trustees of an express trust with costs of an action prosecuted by them as such, a special order of the court is necessary. The ordinary judgment is not enough, without something to show that mismanagement or bad faith on the part of the plaintiffs was made to appear to the court.

The proper practice in such a case is to make a specific application to the court, founded on notice to the other party.

Appeal from an order.

This action was brought by Hiram Slocum and others, respondents in this appeal, against Charles H. Barry, the appellant.

The cause of action alleged in the complaint was a subscription made by the defendant to a fund for the Troy University, of which the plaintiffs were the trustees. When the cause was called at the circuit, the plaintiffs did not appear, and the defendant took the usual order dismissing the complaint. Judgment having been entered thereon for costs, the defendant issued execution against the plaintiffs to collect the costs from them personally; but he did not previously obtain from the court any order charging them personally, or allowing such execution to issue.

The plaintiffs moved at special term to set aside the execution, and the motion was denied, with costs; but

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upon an appeal to the court at general term, this order was reversed.

The court at general term held that the plaintiffs, being trustees, shown to be such by the subscription paper set forth in the pleadings, and having no individual interest in the cause of action, they were trustees of an express trust, within section 113 of the Code of Procedure, and the contract was to be regarded as made with them as such trustees, and the formal judgment of dismissal against them personally was not conclusive as to their personal liability, but must be taken in connection with the pleadings, which showed that they acted in the capacity of trustees. Hence an order of the court was necessary to charge them personally. The execution was accordingly ordered to be set aside.

From the order entered on this decision the defendant appealed to the court of appeals.

Mr. Reynolds, for the defendant, appellant.

Mr. Millard, for the plaintiffs, respondents.

BACON, J.—This is an appeal from an order of the general term, in the third district, reversing an order of the special term, denying a motion by the plaintiffs to set aside an execution against the property of the plaintiffs.

The plaintiffs brought the action to recover from the defendant the amount of a subscription made by him for the benefit of the Troy University.

In the complaint they describe themselves as trustees of such institution, and they incorporate the subscription, which the defendant, with others, signed, by reference, into the complaint.

At the circuit, the plaintiffs not appearing to prosecute the suit, the defendant took the usual order dismissing the complaint, with costs, and upon this a judgment was entered, and an execution issued to collect the amount of costs of the plaintiffs personally; and the question is,

whether this can be done without a special order of the court directing it.

The plaintiffs are trustees of an express trust, as defined by section 113 of the Code.

They are the persons with whom and in whose name the contract was made, for the benefit of another. The defendant's counsel claims that the designation of the plaintiffs, in the complaint, as trustees for the benefit of the Troy University, is mere matter of description, and does not indicate that they sue in any other character than as individuals. This might be so, if it were not for the fact that the subscription is set forth as part of the complaint, in which the plaintiffs are distinctly named and designated as trustees for the benefit of the university to be thereafter organized, and their powers and duties minutely defined; and the defendant, with others, entered into the engagement with them to pay the amounts, by him and them subscribed, to them as trustees, and for the purposes set forth in the subscription paper.

Nothing can be clearer than that they acted in a trust capacity, and that the defendant contracted with them as such, and that their names were used by the *cestui que trust* for the purpose of enforcing the subscription. No action, I conceive, could have been brought upon this subscription by the plaintiffs, in any other than a representative capacity, and as trustees of this express trust.

This being so, it follows that the collection of no costs could be enforced against the plaintiffs personally, without an express order of the court to that effect.

By section 317 of the Code, it is provided that where costs are awarded in an action prosecuted by a trustee of an express trust, the same shall be chargeable only upon, or collected out of, the estate, party, or fund represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the prosecution or defense of the suit.

The defendant's counsel insists, that by the judgment in this case the court did direct the plaintiffs to pay the costs personally, and that there is no proof to show that the

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judge who rendered the judgment did not intend that such should be the result.

No such inference can fairly be drawn from the mere fact that the ordinary direction was given at the circuit dismissing the complaint.

The section which provides for such a judgment, only allows it to be given when mismanagement or bad faith is imputed to the party prosecuting or defending ; and clearly, this must be made to appear to the court, in some form, before such an order can be made, or such a judgment rendered. The true practice, we think, is to make a specific application, for such an order, founded on a notice to the other party to the end that he may have an opportunity to repel, if he can, the charge of mismanagement, or the imputation of bad faith.

Such a conclusion cannot legally be drawn from the mere fact that he does not happen to appear when the cause is called on the calendar, and an order of dismissal is taken against him.

The question must, in some form, be presented to the court for its judicial determination. No such application, as far as appears, was presented in this case, and it is substantially conceded that none was made ; and the form of the judgment, as rendered, does not authorize the collection of the execution to be enforced, personally, against the plaintiffs.

The order of the general term should be affirmed with costs.

Order accordingly.

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HUBBELL *against* SIBLEY.

Supreme Court, Fifth District; Special Term, Sept., 1868.

CHANGE OF PLACE OF TRIAL.—LOCAL ACTIONS.

An action to set aside a statutory foreclosure of a mortgage of real property, and to redeem the land from the mortgage, is not local, and necessarily to be tried within the county where the land is situated.*

The first clause of section 123 of the Code of Procedure,—by which actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property, are to be tried within the county,—is to be construed as relating to actions in the nature of ejectment and trespass, and others which were formerly causes of legal cognizance solely.

Motion to change place of trial.

This action was brought by Alrick Hubbell against Hiram Sibley, to set aside the foreclosure of a mortgage by advertisement, on the ground of irregularities in the proceedings to foreclose. The plaintiff also asked to have it adjudged that the mortgagee took and is in possession of the mortgaged premises as such; that he account, as such mortgagee in possession, for the rents and profits, and for proceeds of sales, &c., and if on such accounting it be ascertained that he has received the full amount of his debt, interest and costs, &c., that the plaintiff, who owns the equity of redemption, be allowed to redeem and take possession of the mortgaged premises remaining unsold.

Issue having been joined, a demand was made by the defendant for a change of the place of trial, from the county of Oneida, where the venue was laid, to the county of Monroe, where the mortgaged premises were situated, which was refused, whereupon the present motion came on for a hearing.

The defendant, in support of the motion, relied upon

* Compare *Wood v. Hostetter*, 3 *Abb. Pr.*, 14; *Rawls v. Carr*, 17 *Id.*, 96.

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an affidavit which recited the fact that the premises in question were situated in the county of Monroe, and asked that in pursuance of the provision of section 123 of the Code of Procedure, the place of trial should be changed.

W. F. Cogswell, for the motion.

Richardson & Adams, opposed.

MULLIN, J.—The language of section 123 of the Code is broad enough to cover the case before me, and to require the trial to be had in the county of Monroe, where the land is situated, instead of the county of Oneida, which is the place of trial designated by the complaint, if the language alone is to control in the decision of the motion.

The section requires actions for the following causes to be tried in the county where the subject of the action, or some part thereof, is situated.

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

4. For the recovery of personal property distrained for any cause.

In this action the plaintiff claims to be the owner of certain interests in the land described in the complaint, and asks that such interest be declared and possession thereof delivered to him.

He is therefore seeking to recover an estate or interest in real property, or the determination of such right or interest.

If this case must, under this section, be tried in the county of Monroe, it necessarily follows that every action for the redemption of mortgaged property; for the specific performance of contracts for the purchase and sale of land; all actions of creditors to set aside deeds, assignments or incumbrances by reason of fraud; all actions to impress trusts and to enforce liens upon lands; in short, by far the largest portion of equitable actions must upon

such a construction of the statute be tried in the county where the land which is the subject of the action, is situated.

Such a rule would be most oppressive and unjust, and I am quite sure that no such result was intended, or even contemplated, by the legislature, in framing the section in question.

In construing the section under consideration, regard must be had to the law regulating the place of trial of civil actions in force before the Code, as without reference to it the real meaning of the section cannot be so correctly ascertained.

Before referring to former legislation, it is proper to say that before the Code equity cases had no venue or place of trial,—they were heard by the vice-chancellor at the places designated in each district for holding equity courts, and they were then heard, on evidence taken by examiners, or upon the findings by a jury on feigned issues sent to the circuit courts to be tried.

When the distinction in the mode of trial of law and equity cases was abolished, and equity cases were required to be placed on the circuit or special term calendars, it became necessary to establish some rule by which to ascertain the counties in which they should be triable. The Code applies to both, and the places of trial in legal and equitable cases are to be determined by the same rules.

By the Revised Statutes (2 *Rev. Stat.*, 1st ed., 409, § 2) it was provided that issues joined in the supreme court should be tried in the proper county, as follows:

1. Actions for the recovery of any real estate, or for the recovery of the possession of real estate; actions for trespass on land, and actions of trespass on the case for injuries to real estate, should be tried in the county in which the subject of the action was situated.

2. Actions of trespass and on the case for injuries to the person or personal property, should be laid in the county where the cause of action arose.

3. All other actions, with certain exceptions not ne-

cessary to specify, were required to be tried where the venue was laid, subject to the power of the court to change it for the convenience of witnesses, and other considerations.

Actions on the case for nuisance and waste were local (*Graham's Pr.*, 2nd ed., 195).

Issues in proceedings to determine claims to real estate and in partition, were triable in the county where the lands lay.

Ejectment was the form of action prescribed by the legislature, in the Revised Statutes, for the recovery of lands, tenements and hereditaments, by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser, and for the recovery of dower.

The cases in which it might be brought were those in which it had been theretofore brought, and in those in which a writ of right might have been brought.

At the common law, which was in force when the Revised Statutes took effect, ejectment lay only for corporeal hereditaments (*Adams on Ejectm.*, 18); for anything attached to the soil, of which the sheriff could deliver possession (*Jackson v. May*, 16 *Johns.*, 184). It lay for common appurtenant or appendant; for a boillery of salt; for a mine; for land occupied as a highway; for the first grass which grows annually on land, and for hay-grass and after-math; for the herbage growing on land; for the pasture of an hundred sheep, and for pannage or mast which falls from the trees (*Adams on Ejectm.*, 19-23).

In ejectment, therefore, the plaintiff could recover not only the fee, but any lesser estate or *interest* in land, of which possession could be delivered by the sheriff.

By 2 *Rev. Stat.*, 1st ed., 303, § 3, it was declared that no person should recover in ejectment, unless he had, at the time of commencing the action, a *valid subsisting interest* in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some *share or interest*, or portion thereof, to be proved and established on the trial.

In the proceedings to compel the determination of

claims to real property, the party instituting the proceedings, or he and those under whom he claims, must have been in the possession of the premises which are the subject of the proceedings, three years, claiming them in fee, or for a term of years, not less than ten; and he could proceed to bar the claim which any other persons might make to any estate in fee or for life, or for a term of years, not less than ten, in possession, reversion or remainder, to such land or tenements.

Although the Code has abolished the forms of actions, and the action of ejectment *eo nomine* is unknown to the law, yet the right to recover the same estates, rights and interests in lands, tenements and hereditaments, remains and is enforced by actions as before, and the action to be brought is still an action at law, as distinguished from a suit in equity.

If this is so, then the substitute provided by the Code for the action of ejectment is an action for the recovery of real property, or of an estate or interest therein, and proceedings to determine claims to real property, whether prosecuted by action, or in the mode prescribed by the Revised Statutes, determined the right or interest of the parties to the proceedings to real property.

Injuries to real property were recovered for in actions of trespass or case, in the courts of law, except in cases of waste or nuisance, when courts of equity had jurisdiction for certain purposes.

It will be seen, from this brief and imperfect outline of the proceedings in ejectment—in proceedings to determine claims to real estate, and actions for injuries to real property, that all the clauses of the first branch of section 123 of the Code are satisfied without the necessity of recourse to equitable actions to give effect to any of its provisions.

In the legal actions is recovered the fee, or a lesser estate or interest, and in the other proceedings, a right or interest is determined.

It seems to me quite clear that the language of the clause under consideration, "*for the determination in*

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any form of such right or interest," was intended to apply to the proceedings provided by the Revised Statutes for the determination of claims to real property, whether prosecuted by an action, or in the manner provided by the statute, and that it is not to be extended beyond such proceedings.

The words "*for the determination in any form of such right or interest,*" imply that there are or may be more forms than one in which to determine rights or interests in real estate. There is now but one form of action for the enforcement of both legal and equitable claims, or causes of action, so that the words "*in any form*" cannot apply to actions, but may with great propriety apply to the remedy by action, and to the proceedings provided by statute for determining claims to real estate.

The second subdivision of the section makes actions for the partition of real property local.

Proceedings in partition might have been prosecuted either in the law courts, or in courts of equity, at the will of the party.

The foreclosure of mortgages by action was confined to the courts of equity.

It would seem, from this classification of the actions declared to be local, that the first class embraced those which were theretofore triable in the courts of law. The second, those of which courts of law and equity had concurrent jurisdiction; and the third, a class of actions of which equity alone had jurisdiction.

Why did the codifiers make but one class of equitable actions local, if the intention was to make all such actions local in which any right or interest in real estate might be determined?

If the language used in the first subdivision of section 123 was broad enough, and was intended to embrace all actions, legal or equitable, in which the determination of a right or interest in real estate was involved, why specify actions for the foreclosure of mortgages?

An action of foreclosure involves the determination of

an interest in land, and was provided for by the first subdivision, if equitable actions were intended to be covered by it.

But again: the considerations which induced the legislature to make real actions local, have no application to equitable actions, although they may involve the determination of rights and interests in real estate.

In ejectment, in waste or nuisance, and in the proceedings to determine claims to real property, questions of boundary, of local usage, of succession as well of heirs as purchasers, are very frequently involved, making it important, if not necessary, that the trial of such questions should be laid as conveniently as may be to where the witnesses reside, and by a jury cognizant of local usages and customs.

These considerations have had no weight in determining the place of trial in equitable actions, and they are entitled to no more weight now than they were under the former practice. They are still heard by a single judge, without a jury, and the place of trial is subject to be changed to accommodate the witnesses.

Without occupying more time upon the questions, I am of opinion, and so decide, that the place of trial in this action is not local, and it is properly located in the county of Oneida, and the defendant cannot require it to be changed to Monroe.

The motion is therefore denied, without costs.

MESSEROLE *against* TYNBERG.*New York Common Pleas, Special Term; Sept., 1868.*

TRADEMARK.—INJUNCTIONS.—BURDEN OF PROOF.

In an action brought to enjoin the defendant from using the plaintiff's trademark, if the plaintiffs can be pronounced the first to use the word claimed by them, although it be a popular term, and one in general use,—*e. g.*, the word Bismarck,—as a designation of a particular style of goods made by them, and to have acquired by its manufacture and sale under that name a valuable interest in such designation, the defendant must be estopped from using it for the same purpose. The plaintiffs had the right to appropriate such name, in common with others, for a new purpose, and having done so, are entitled to avail themselves of all the advantages of their superior diligence and industry.

There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer. Both give currency to the articles to which they are applied, and distinguish them from other manufactures of a similar character.

All the essential requisites to the plaintiff's right to protection flow from the prior use of a term, symbol, or word, which has created for his manufacture a celebrity or value; and the burden of showing that the claim of priority is unfounded, or the absence of any injury resulting from its imitation, rests upon the defendant.

Motion to dissolve an injunction.

This action was brought by Cornelius M. Messerole and James L. Libby against Morris A. Tynberg. The plaintiffs claimed an exclusive right to use the word "Bismarck" in its application to paper collars. They obtained a preliminary injunction against an infringement by the defendant, which the defendant now moved to dissolve.

Spring & Wetmore, for the motion.

Clarence A. Seward, opposed. The fact that an injunction was issued establishes the plaintiff's *prima facie*

right. The defendant claims to have successfully attacked such *prima facie* right: 1. Upon the fact of priority of appropriation. 2. Upon the law.

I. Upon the affidavits the defendants do not show a prior use of the trademark in question.

II. One of the main elements which determines commercial profits is the quality which arises from integrity and skill, and which is known as "*character*," *good will*," or "*reputation*." When this is attached to person or locality, the protection of the law is unnecessary. When natural identification becomes impossible, the genuineness of the commodity can be guaranteed by representation only; in other words, by a mark, name or symbol, which assures the consumer that the manufacture is genuine. Such name, mark, or symbol, then becomes the trademark of the tradesman. The protection of the law is necessary to insure the efficacy of the mark, to protect him whom it represents from injury, and the public from imposition.

The law of trademark is of comparatively recent origin. The principle upon which it is based is old, and is found in the maxim—*sic utere tuo, ut non alienum laedas*. The rivalry and competition of an increasing trade have rendered it necessary that equity should enforce the maxim, and its decisions, in so doing, constitute the law of trademarks.

III. Trademarks are variously described as names, titles, insignia, devices, indicia, letters, forms, words, symbols and accompaniments, including the style of putting up, and the envelope of the commodity. These marks have been protected by the court for two reasons: *First*, To prevent imposition upon the public; and, *Secondly*, To protect the right of the manufacturer to his property in the mark. The cases all arrange themselves under these two subdivisions.

1. The court will protect the trademark, to prevent imposition upon the public (*Southern v. How*, *Cro. Jac.*, 470; *Singleton v. Bolton*, 3 *Doug.*, 293; *Blanchard v. Hill*, 2 *Atk.*, 484; *Crawshay v. Thompson*, 4 *Mann. & G.*, 357, 386;

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Day v. Day, *Eden on Inj.*, 314; Canham v. Jones, 2 *Ves. & B.*, 218; Perry v. Truefit, 6 *Beav.*, 66; Snowden v. Noah, *Hopk.*, 352; Bell v. Locke, 8 *Paige*, 75). 2. The court will protect the right of property of the manufacturer in his trademark (Clark v. Clark, 25 *Barb.*, 76; Brooklyn White Lead Co. v. Masury, *Id.*, 416; Burnett v. Phallon, 22 *Law Rep.*, 220; S. C., 9 *Bosw.*, 192, 196.

IV. The defendant has a right to manufacture and sell paper collars under such name as he may select, provided that by so doing he does not select a name which others have appropriated, and which identifies in the market their manufacture. He has no right to take a word previously appropriated by the plaintiffs, and apply it in the same way in which the plaintiffs use it (Morrison v. Salmon, 2 *M. & G.*, 385; Rodgers v. Nowill, 5 *M. G. & S.*, 110; S. C., 17 *Eng. Law & Eq.*, 83; Croft v. Day, 7 *Beav.*, 84; Blofeld v. Payne, 4 *B. & A.*, 409; Sykes v. Sykes, 3 *B. & C.*, 541; Millington v. Fox, 3 *M. & C.*, 339; Pidding v. How, 8 *Sim.*, 477; Knott v. Morgan, 2 *Keen*, 213; Flavell v. Harrison, 19 *Eng. Law & Eq.*, 15; Clement v. Mad-dick, 22 *Law Rep.*, 428; Taylor v. Carpenter, 3 *Story*, 458; 11 *Paige*, 292; Coffeen v. Brunton, 4 *McLean*, 516; 5 *Id.*, 256; Goult v. Aleploghler, 6 *Beav.*, 69; S. C., 7 *Am. Jur.*, 277; Christy v. Murphy, 12 *How. Pr.*, 77; Amoskeag Manufg. Co. v. Spear, 2 *Sandf.*, 599; Howard v. Henriques, 3 *Id.*, 725; Stone v. Carlan, 13 *Law Rep.*, 360; Gillott v. Kettle, 3 *Duer*, 624; Fetridge v. Merchant, 4 *Abb. Pr.*, 156; "The Medicated Mexican Balm," 6 *Beav.*, 66, and "The Chinese Liniment," 4 *McLean*, 516; Williams v. Johnson, 2 *Bosw.*, 1; Howe v. Searing, 6 *Bosw.*, 354; S. C., 10 *Abb. Pr.*, 264; Comstock v. Mobre, 18 *How. Pr.*, 421; Gillott v. Esterbrook, 47 *Barb.*, 480; Marsh v. Billings, 7 *Cush.*, 322; Seixo v. Provezende, 1 *Eng. Law Rep., Ch. Ap.*, 197; Braham v. Bustard, 9 *Law Times N. S.*, 199). The defendant here insists that because "Bismarck" is the name of a distinguished German citizen, no such exclusive right to the same can be successfully claimed by the plaintiffs, for the reason that the law does not permit the use by one man of the name of another, to

the exclusion of the right of all others to use the same name. This is fallacious (*Matsell v. Flanagan*, 2 *Abb. Pr. N. S.*, 459; *Smith v. Woodruff*, 48 *Barb.*, 439; *Barrows v. Knight*, 6 *R. I.*, 434; *McAndrews v. Bassett*, 10 *Jur. N. S.*, 550; *Dent v. Turpin*, 7 *Id.*, 673; *Callada v. Bard*, 7 *N. C. L. J.*, 132; *Harper v. Pierson*, 3 *Law Times N. S.*, 347; *Braham v. Bustard* (*supra*); *Hall v. Barnes*, 9 *Law Times N. S.*, 561.

V. Upon the general objections, we answer: 1. The owner of a trademark will not be deprived of a remedy in equity, even if it is shown that all who buy goods bearing the mark, from the defendant, were well aware that the goods were not of the plaintiffs' manufacture. It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market. It is not necessary to say that any person was deceived, if the resemblance in the article is such as would be likely to cause one mark to be mistaken for another (*Eldestein v. Eldestein*, 1 *De G., J. & Sm.*, 185). 2. If the goods of the manufacturer have, from a mark or device he has used, become known in the market by a particular name, the adoption by a rival trader of any mark which will cause the goods to bear the same name in the market, may be as much a violation of the rights of that rival, as the actual copying of his device (*Seixo v. Provezende*, *supra*). 3. The plaintiff is not bound to prove that the defendant has copied his mark in every particular. If the indicia or signs used tend in any way to induce the belief on the part of the purchaser that he is buying the plaintiff's manufacture, the court will grant the injunction. The court will do this until the merits of the case can be ascertained and determined (*Waltton v. Crowley*, 3 *Blatchf.*, 447). The relief of the court is given because the mark is a sign or representation importing (and so understood and acted upon by the public) that the article to which it is attached is the manufacture or production which is generally known in the market under that denomination.

BRADY, J.—Upon the conclusion of the arguments on the motion which was made to dissolve the injunction

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granted herein, I was impressed with the belief that the application must be denied ; and subsequent examination of the proofs, papers and authorities, confirmed that view. The subject of trademarks is exhausted by the briefs of the respective counsel, and an array made of American and English cases which shows their zeal and industry.

Due consideration of the whole case results, however, in this proposition : If the plaintiffs can be pronounced the first to use the word "Bismarck," although a popular term and one in general use, as a designation of a particular style of paper collars made by them, and to have acquired by its manufacture and sale under that name a valuable interest in such designation, the defendant must be estopped from using it for the same purpose. The plaintiffs had the right to appropriate such name, in common with others, for a new purpose ; and having done so, are entitled to avail themselves of all the advantages of their superior diligence and industry. There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer. Both give currency to the articles to which they are applied, and distinguish them from other manufactures of a similar character. All persons stand alike on this theory, and all are entitled to protection. This rule is logically and justly evoked from the decisions relating to trademarks, although, as I have had occasion to observe in another case, it may be said that there is a seeming although not real absence of uniformity in the doctrines established by them. I do not deem it necessary to analyze them. It is more practical and quite sufficient to state what in my judgment is applicable to this case as one of the results of these determinations, and it is this :

Whenever a trademark is employed to designate a particular manufacture, whether the term used is a popular one formed of words or symbols common to the world, or one expressly created for the purpose to which it is applied, and the manufacture acquires reputation and becomes valuable as an article of merchandise, an imitator

thereof, for a kindred or similar manufacture, is presumed to intend wrongfully, and the burden rests upon him to show that there is either no property in the term or symbol, arising from priority of use for the article to which it has been applied, or that no deceit or injury can result from the imitation (*Piddings v. Howe*, 8 *Sim.*, 479; *Knott v. Morgan*, 2 *Keen*, 213; *Barrows v. Knight*, 6 *R. I.*, 434; *Marsh v. Billings*, 7 *Cush.*, 323; *Braham v. Bustard*, 9 *Law Times N. S.*, 199; *Harper v. Pearson*, 3 *Id.*, 547; *Hall v. Burrows*, 9 *Id.*, 561; *Smith v. Woodruff*, 48 *Barb.*, 439; *Howard v. Henriques*, 3 *Sandf.*, 725; *Stone v. Carlan*, 13 *Law Rep.*, 360; *Matsell v. Flanagan*, 2 *Abb. Pr. N. S.*, 459; *Coffeen v. Brunton*, 4 *McLean*, 516; *Edelstein v. Edelstein*, 1 *De G., J. & S.*, 185; *Walton v. Crowley*, 3 *Blatchf.*, 447; *Davis v. Kendall*, 2 *R. I.*, 570; *Newman v. Alvord*, 49 *Barb.*, 588.

The cases have become numerous because success provokes rivalry, and fair dealing does not always characterize competition. I have been unable to yield to the conviction which some persons seem to entertain, that it is fair dealing designedly to appropriate for the same object a word, symbol, or term first employed by another for a particular purpose, although such word, symbol, or term is one in general use, and belongs in common to the world. The word, symbol, or term, abstractly considered, is not the subject of special right or property, but it may become so when the application of it identifies a particular manufacture, and the thing made and the word, term, or symbol, as applied to it, are synonymous. "Property in a word for all purposes cannot exist, but property in a word as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice once gets into the market so stamped. Reputation in the market, whereby the stamp gets currency and an indication of superior quality, or of some other circumstance which would render the article so stamped acceptable to the public, is property." Lord WESTBURY, in *McAndrews v. Bassett* (10 *Jur. N. S.*, 550).

There is a class of cases, such as *Corwin v. Daly* (7

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Bosw., 222), where the plaintiff endeavored to appropriate the name of "Club House Gin;" and *Binninger v. Wattles* (28 *How. Pr.*, 206), where the designation employed by the plaintiff was "Old London Dock Gin," which would seem to conflict with the rule stated; but such is not the fact. The distinction between these and cases kindred to these is pointed out by Judge DANIELS in commenting upon them, as he did in *Newman v. Alvord* (*supra*).

After showing that the protection sought in those cases was denied upon the ground that the terms adopted were previously in popular use for the same purpose as that to which the plaintiffs claimed the right specifically to appropriate them, he said: But neither these decisions, nor any others to which they refer, sanction the conclusion that because a term is in popular use it can be burdened with no new use of a special and exclusive character for the purpose of identifying the trade and manufacture of a particular individual. It is to be observed also that the rule which originally prescribed that fraud was a necessary element in the plaintiff's case to be affirmatively established by him has ceased to exist (cases *supra*). And all the essential requisites to the plaintiff's right to protection flow from the prior use of a term, symbol, or word which has created for his manufacture a celebrity or value, and the burden of showing that the claim of priority is unfounded, or the absence of any injury resulting from its imitation, rests upon the defendant.

This case demands a decision upon the precise proposition considered, inasmuch as the word Bismarck was applied to men and to things of various kinds prior to the use of it by the plaintiffs to distinguish their manufacture of paper collars, and was a popular term. The plaintiffs, however, were, in my judgment, the first to employ it as they did, and their collars, thus designated, acquired a valuable reputation in the market. It follows as a natural deduction that the imitation of the plaintiff's mark was predicated on the reputation which their paper collars of that name had acquired, and of which the defendant sought to avail himself. If competition, fair and honor-

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able, as I understand it, had alone stimulated the defendant, he should have relied upon the quality or some attribute of his manufacture, and selected some distinctive appellation for it. It is the policy of the law to encourage enterprize, but not at the expense of superior diligence and industry. The market is closed against no one who, in a fair and honest spirit of rivalry, seeks to monopolize the entire trade in one or more articles of merchandise, but the elements of fraud, deceit, or malappropriation of another's rights can receive no countenance from courts of equitable jurisdiction.

It is unnecessary, however, to pursue this subject further, except to say that the defendant may not be subject to the charge of unfair dealing in fact. If he honestly believes himself entitled to use the mark introduced by the plaintiffs from a conviction that they were not the originators of it, for the purposes to which they applied it, the general observations herein contained about fair dealing may not apply to him, although the legal results would be the same. I have considered this case in a general sense, without intending to reflect upon the defendant particularly.

The motion to dissolve the injunction must, for the reasons assigned, be denied, with ten dollars costs.

TICKNOR *against* KENNEDY.

New York Common Pleas ; General Term, June, 1868.

MARINE COURT JUDGMENT.—SUMMONING JOINT DEBTORS.

A summons against a joint debtor not served in the action, requiring him (under section 375 of the Code of Procedure), to show cause why he should not be bound by the judgment, cannot be issued on a judgment of the marine or district courts, although it has been docketed in the county clerk's office.

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Appeal from an order.

The plaintiffs, Howard M. Ticknor and others, recovered judgment in the New York marine court, against Francis J. Kennedy and others, for more than \$25, exclusive of costs. After filing a transcript of it in the county clerk's office, the plaintiffs' attorney proceeded to summon one of the defendants who had not been served, to show cause why he should not be bound by it, under section 375 of the Code of Procedure.

A motion to set aside the summons was denied at special term (reported 3 *Abb. Pr. N. S.*, 387), and the defendant appealed to the court at general term.

Stephen A. Walker, for the appellant.

Smith & Woodward, for the respondents.

DALY, F. J.—Section 375 applies only to judgments recovered against one or more persons jointly indebted, by proceeding as provided in section 136. This judgment was not recovered “by proceeding as provided for in section 136, but was recovered under a provision of the Revised Laws of 1813, which authorized judgments in this form against joint debtors, in justices' courts (2 *Rev. Laws of 1813*, 378). Section 375, therefore, is not applicable to it. It is, by the filing of the transcript, to be enforced in the same manner as, and to be deemed a judgment of, this court; but that does not make it a judgment which was recovered by proceeding as provided for in section 136, for the proceeding provided for in that section is in a civil action commenced in a court of record (§ 127).

BARRETT, J.—No judgment is *recovered* in this court by the docketing of a marine or district court judgment in the county clerk's office; nor does the judgment, *recovered elsewhere*, thereby become, in fact, a judgment of this court. It is to be enforced in the same manner as, and, by a sort of statutory fiction, be deemed, a judgment of this court.

The words "and be deemed" are to be construed, not as a separate and additional provision, but rather as an expression of the legislative intention to prevent any misconstruction of the previous language (*Martin v. The Mayor*, 11 *Abb. Pr.*, 295; affirmed, 12 *Abb. Pr.*, 243). This being the case, the process of binding the joint debtor, who was not originally served, is not an enforcing of the judgment. To enforce the judgment, is to exhaust every known remedy for compelling its payment out of the joint property of the defendants, and the individual property of the defendant served. Anything beyond that is the acquisition of an additional right—indeed of an additional judgment; for the remedy against the joint debtor, who was not served, is upon the original claim, and not upon the judgment (*Oakley v. Aspinwall*, 4 *N. Y.*, 513; *Foster v. Wood*, 30 *How. Pr.*, 284; *Dean v. Eldridge*, 29 *Id.*, 218); and an action thereupon may even be maintained against him, personally, without joining the defendant who was served (*Johnson v. Smith*, 14 *Abb. Pr.*, 421). He is not a judgment debtor; but, as was said by Judge DALY, in *Foster v. Wood*, *supra*, "a joint debtor, and nothing more." The proceeding, therefore, is not to enforce the judgment, but to bind the party by it, by *enforcing* against him the original debt.

I agree with Judge DALY, that the judgment was not recovered "by proceeding as provided in section 136." This expression must be read in the light of the context, and with reference to the inapplicability of sections 375 and 136 to the marine and district courts. The judgment was recovered, therefore, in a court not contemplated by these sections, and by "proceeding as provided" in a totally different law, which happens to authorize a somewhat similar mode of procedure.

The true and convenient remedy is by action in the form indicated by Judge BRADY, in *Johnson v. Smith* (*supra*). Even where the judgment has been recovered in a court of record, an action lies, and the statutory proceeding is merely cumulative (*Dean v. Eldridge*, *supra*). And the practice contended for would, in my judgment,

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be both inconvenient and anomalous, even if authorized by special legislation. It would involve our binding a party by a judgment of which we have no record. The record of the original judgment would remain in the marine court, and its docket in the county clerk's office, while that of the judgment against the individual bound would be in this court. The recoveries, too, would vary according as the latter judgment might be increased by additional costs, or decreased by a partially successful defense to the original claim—a difficulty of but little moment where all the proceedings are in one court.

Again: if an appeal were pending in the marine court, the confusion would be still greater; for we know that, although the judgment of that court is, upon the filing of a transcript, to be deemed the judgment of this court, yet the appeal thereafter proceeds to their general term, and if the judgment be there reversed, it ceases to be deemed a judgment of this court. Similar difficulties would arise in case of the opening of a default in the marine or district court. These illustrations serve also to show that the judgment of the marine or district court is correctly deemed to be the judgment of this court solely for the purpose of enforcing it, and that it can never become such in fact or for all purposes. Much less is the *recovery* of a judgment in this court effected by the filing of a transcript.

For these reasons, I concur in the result arrived at by Judge DALY.

BRADY, J.—I adhere to the opinion expressed at special term. There is nothing in section 375 which, in my judgment, prevents the adoption of the rule sought to be established in this case. It declares, “that when a judgment shall be recovered against one or more persons jointly indebted upon a contract, *by proceeding as provided in section 136*, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned.” Section 136 declares, “that if the action be

against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct," and provides for the effect of a judgment in such a case, when founded upon a service of the summons upon some only of the defendants.

In this case, the plaintiff took judgment against the defendant served, under the *Laws of* 1813, referred to by Judge DALY, and, in effect, though not precisely in form, proceeded as provided in section 136. The right of the plaintiff to proceed at all, depends upon the effect which may be given to section 68, already considered by me, in my opinion at special term. The proceeding thus instituted does not deprive the defendant of any right. He may, under section 379, make any defense which he might have made to the action if the summons had been served on him at the time when the same was originally commenced, and such defense had then been interposed in such action. If he have no defense, the judgment binds him by an order to be made in the cause, and the plaintiff obtains, by a summary mode, an effective judgment against all the property of the debtors.

HARRIS *against* THE AMERICAN BIBLE SOCIETY.

Court of Appeals; September Term, 1867.

WILL.—DEVISE TO CORPORATION.

A corporation chartered for the purpose of receiving and holding in trust property committed to them by bequest, &c., in trust for an unincorporated association, with power to execute any trusts confided in them by such association, may take a fund bequeathed to them to be expended under the direction and for the appropriate uses of a committee of such association.—FULLERTON, J.

The provision of the *Laws of* 1860, 607,—that a testator leaving husband,

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wife, child, or parent, shall not devise to benevolent, &c., societies more than one-half his estate, &c.,—is peremptory, and may be insisted on by any person who would derive a benefit therefrom, although not one of the relatives designated in the statute. And the one-half is to be computed with reference to the estate at the time of the testator's death.—FULLERTON, J.

Appeal from a judgment.

This action was brought by Ellen Harris against Jeremiah Slaght and others, the executors of Folkerd C. Sebring and his widow, and the American Bible Society, and three other corporations.

Cornelius Sebring, of Ovid, Seneca county, died previously to 1830, seized, among other property, of a lot of land in that town, containing about thirty acres. He left two sons and four daughters, his only heirs-at-law. His son Folkerd died in 1861, without issue, but leaving a will, which purported to dispose of his whole estate. In 1862, Ellen Harris, the plaintiff, one of the daughters of Cornelius, brought an action in the supreme court for a partition of the thirty-acre lot, claiming one-fifth thereof, by descent. She claimed that the dispositions of her brother Folkerd's will in favor of religious societies or institutions were void, and asked for a determination accordingly.

Cornelius Sebring left a will, the material portion of which is as follows:

“*Third.* I give and bequeath my son Folkerd thirty acres of land on which he now lives, my young black mare, two hundred dollars in six months after my decease, and one-sixth part of my personal property not otherwise disposed of.”

Folkerd C. Sebring by his will gave his wife a life estate in all his property, real and personal, and directed that on her death the whole should be sold by his executors, “and that the proceeds thereof be paid over to the following named charitable societies in four equal portions.” Then were named three corporations of a religious or missionary character: viz.: The American Board of Commissioners for Foreign Missions, The American Bible Society, and The American Tract Society.

The other fourth part or portion was given in the following words :

“ Another fourth part of all the proceeds * * * to be paid over to the Trustees of the Presbyterian House, incorporated April 21, 1855, by the legislature of Pennsylvania, to be expended under the direction and for the appropriate uses of the Home Mission Committee of the General Assembly of the Presbyterian Church in the United States of America.”

The legislature of Pennsylvania, on the 21st day of April, 1855, had passed an act, which, after reciting that “ The General Assembly of the Presbyterian Church,” which held its session in Philadelphia in May, 1854, had appointed John A. Brown and others named, “ Trustees of the Presbyterian House,” created those persons and their successors a corporate body by the name of the “ Trustees of the Presbyterian House.”

The preamble recites a request that the act of incorporation “ should contain a general provision authorizing the said trustees to hold in trust for said assembly, any property committed to them by donations, bequests, or otherwise.”

The 4th section of the act is as follows : “ That the trustees hereby incorporated, and their successors, shall be subject to the direction of the said assembly and their successors, have full power to manage all funds, property, and effects committed to their care, by gift, purchase, bequest, or otherwise, and to execute any trusts confided to them by said General Assembly, or their successors, in such manner as shall be deemed most advantageous, and not contrary to law or the intention of the donor or testator.”

The present action was tried at a special term in the county of Seneca, where the complaint was dismissed with costs.

On an appeal taken by the plaintiff to the court at general term in the seventh district, the court held that Folkerd took a *fee simple* in the thirty-acre lot under his father's will : that the provision of Folkerd's will direct-

ing the sale was valid as a power in trust; that the bequests to the four societies were valid to the extent only of one-half of the property *so bequeathed to each*. The court also directed, that after the death of decedent's widow, the whole of Folkerd's real and personal estate be converted into money, and after paying to the plaintiff, the executors, and the four corporations, their costs of this action, one-eighth part of the net proceeds be paid to each of the four corporations.

Distribution of the residue of the proceeds was also directed among the individual defendants who are descendants of C. Sebring.

The plaintiff appealed to this court from so much of the judgment as declared that Folkerd took a fee in the thirty-acre lot; that the Presbyterian House was entitled to any proceeds of his estate; and from the award of costs to the defendants.

The four corporations appealed from so much of the judgment as reduced their respective bequests below one-fourth of the proceeds of Folkerd's estate, and also from the direction concerning costs.

John E. Seely, for the plaintiff.

Samuel A. Foot, for the American Bible Society.

George A. Titus, for the American Tract Society.

FULLERTON, J.—[The remarks of the learned judge on the effect of the devise to Folkerd in the will of Cornelius we omit.]

2. The beneficiaries contemplated by the third clause of Folkerd C. Sebring's will are plainly therein designated as four "societies." The ultimate and real beneficiary, under the direction to pay over to "The Trustees of the Presbyterian House," is not that corporate entity, nor the individual persons composing it, but some "society."

By turning to the Pennsylvania statute referred to by the will, and reading it as if incorporated with the will (21 N. Y., 330, 331), we find that the "society" for whose benefit this direction is given is the whole mass of persons

constituting the Presbyterian Church in this country, or their General Assembly, viewed as a continuous body, or a particular session of that assembly which met in Philadelphia in 1854, or a certain committee of such General Assembly, viewing the latter in one or other of the aspects just specified. The will gives this committee's title as "The Home Mission Committee."

None of these bodies are incorporated ; and it may be assumed that a direct bequest to any of them, or to an individual for their use, in the general form in which they are referred to by this will as beneficiaries, would be void for uncertainty.

But it is further contended, that although the bequest is to a corporate body, it is still void because the beneficiaries are thus undefined, and are not themselves incorporated.

It is asserted that the corporation has no interest, and is a mere conduit-pipe, through which the money is to flow into the hands of the ultimate beneficiaries.

This is not exactly the fact. By the will, the fund is to be "expended" under the *direction* of the beneficiaries. This implies the very reverse of a simple payment over to the latter.

By the act, this corporation is to "manage" all funds thus coming to its hands. This, to be sure, must be done "subject to the direction of the General Assembly, or their successors."

In both these respects the will and the act substantially correspond. The latter, it is true, enjoins upon the Assembly the practice of issuing its directions to the corporation through a certain specified committee of its body ; and perhaps it also requires the Assembly to devote this portion of its funds to uses supervised by that same committee. The corporate body, however, is to be the managing and disbursing trustee of the bequeathed fund.

As a corporate entity, it is to hold the custody thereof and the legal title thereto.

Both in respect to real and personal property, it is established doctrine, that a trustee to receive, manage, and

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disburse, or even with less powers, has the legal title, and is, in contemplation of law, the owner of the property. It must, however, be conceded that the corporate body, and the corporators, were without any actual right to any beneficial enjoyment; they merely sustain a burden for the enjoyment of the society referred to. But it seems to me that the absence of such right in the corporation, or its corporators, is not material; for such is the condition of most charitable corporations.

The beneficiaries of funds held by incorporated hospitals are persons not entitled to membership in the corporations. And it rarely happens that in such hospitals the corporate body, or any individual member thereof, has any beneficial interest. The fact appearing in this case, that the corporation must, in all substantial respects, obey the orders of the unincorporated and fluctuating multitude for whose use it was created, or the orders of the committee thereof, can have no influence on the validity of the bequest.

Ordinary corporate bodies having charge of the temporalities of our churches are very nearly in this condition; and if they were absolutely and entirely in it—that is to say, if the trustees were forbidden to disburse a dollar without asking the directions of a mass meeting of those who, for the time being, might chance to be attending worshipers—the corporate body would not the less satisfy the requisites of our law concerning gifts to charities, in the particulars now under consideration. The objections to the capacity of this corporation to receive the testator's intended bequest, seem to me, therefore, to be unfounded.

They originate in conceptions impracticably refined and subtle.

Such rigorous constructions are not adapted to the actual concerns of life. The cases cited have been examined, as also the learned and elaborate opinion of the present Chief Judge (DAVIES) in *Downing v. Marshall*, reported by Mr. Howard (23 *Practice Reports*, p. 10). The plaintiff virtually admits every proposition required to support the bequest to “The Presbyterian House,” except what may be involved in the nice criticism referred

to, and that is not, in my judgment, supported by anything found in these citations.

3. The act relating to wills (*Laws of 1860*, p. 607) enacts that "No person having a husband, wife, child, or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary societies, association, or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)."

The testator left no relative or connection named in this act, except a wife ; and she consented to the disposition.

The societies contend that the act was made exclusively for the benefit of the persons referred to by it, and that no others can insist upon the prohibition, or claim its enforcement.

The general term held, and, I think, correctly, that the prohibition is peremptory, and may be insisted on by any person who would derive a benefit therefrom.

The language is absolute ; and if the courts have power in any such case to judge concerning the probable motives of the legislature, and may imply, accordingly, an exception to the positive terms of a statute (on which no opinion need now be expressed), I am unable to discover any safe ground for such a proceeding in this instance.

Consistently with this act, a testator, having the relatives and connections specified, may give half of his estate to a nephew or any remote collateral relative, or, indeed, to entire strangers, and give the other half to the societies described.

It is, therefore, quite clear that it was not designed to compel testators to provide for their families. If a man whose entire estate consisted in realty, and who had none of the relatives mentioned, and only a wife, should die without a will, his widow would take only a life estate in one-third of his lands.

Yet in such a case the statute of 1860 avoids the devises which such a person might have made, to a much

greater extent than is necessary to protect all benefit which the widow could possibly have derived from an intestacy.

The widow may have been barred of dower by a jointure (1 *Rev. Stat.*, 741, §§ 9, 10, 1st ed.). She may have been incompetent to take from alienism ; yet, in either of these cases, if the construction claimed be correct, her consent alone would give effect to a devise not otherwise sustainable.

So to hold would not be implying an exception from the nature and reason of the thing (1 *Johns. Cas.*, 131).

It would be repugnant to both, and violative of our plain duty, to administer the law as we find it written.

The reasons assigned by Judge T. A. JOHNSON in support of the judgment below on this point, are satisfactory and conclusive (*Harris v. Slaght*, 46 *Barb.*, 470).

4. The enactment in question is, that no person shall "by will or testament give or bequeath" to any society of the classes named, "more than one-half part of his or her estate after payment of his or her debts."

As the parties concur, and perhaps rightly, in construing this act as prohibiting dispositions to these purposes, by the same testator, which, taken together, exceed one-half of his entire estate, I will assume that such is the law. No doubt it was the legislative intent.

The supreme court determined that the societies can take only one-half of the proceeds which may be realized on a sale of the estate at the widow's death.

On this a question arises whether the statute, in speaking of one-half of the testator's estate, is not to be regarded as referring to the estate left at the testator's death.

Upon the words and the reason of the thing the affirmative is quite clear. No higher authority can be found ; nor does a resort to precedents seem needful on a point so plain.

If a man leaving two infant children should give each an estate for life, with remainder in fee to his issue, should limit cross-remainders in fee in default of issue, and make an ulterior disposition for a sale, and the payment of proceeds to charitable societies on failure of issue living at the

survivor's death, the judgment below assumes that, on the occurrence of the latter contingency, the societies could take only half of the value at that time.

Nearly or quite a century might have elapsed, and, owing to depreciation or other causes, the proceeds might not amount to one-tenth of what was the value at the testator's death. Yet it is supposed that one-half of this diminished fund should go as upon an intestacy to the next of kin. I do not think so.

The Roman *lex falcidia* forbade a testator to give more in legacies than three-fourths of his effects ; so that there must remain to the heir one-fourth (*Justinian's Inst.*, book 2, chap. 22 ; see Cooper's edition, page 173 ; see the law itself in the Digest, lib. 35, tit. 2, l. 1).

Like the act now under consideration, this law does not, in terms, specify any time for the valuation.

But, commenting upon it, the *Institute* speaks as follows :—

“ The law *falcidia* looks to the quantity of his estate at the time of the death of the testator ; and therefore, if he who is worth but an hundred aurei at his decease, bequeath them all in legacies, the legatees must suffer a defalcation ; for they will be entitled to no advantage, although the inheritance, after the death of the testator, and before it is entered upon, should so increase by the acquisition of slaves, the children of female slaves, or the product of cattle, that after a full payment of the 100 aurei in legacies an entire fourth of the whole estate might remain to the heir ; the legacies, notwithstanding, would still be liable to a deduction of one-fourth.

“ On the contrary, if the same testator had bequeathed only 75 aurei, then, although, before the entrance of the heir, the estate should be so decreased by fire, shipwreck, or the loss of slaves, that its whole value should not be more than 75 aurei, or less, yet the legacies would still be due without defalcation” (*Justinian's Inst.*, book 2, chap. 22, § 2 ; see Cooper's ed., p. 174, and also the editor's note on this § 2 at page 533).

In SANDER'S *Institutes of Justinian* (p. 336, 3rd ed.,

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1865), it is said that "the calculation under the *lex fal-cidia* was made at the time of the testator's death."

The subject is treated of to the same effect, and with great fullness and detail, by DOMAT (*Domat's Civil Law*, part 2, book 4, title 3, § 1, articles 3706, 3707, 3708; see Boston ed., 1850, edited by CUSHING, vol. 2, 588).

When a testator disposes of his property in such a manner that one-half of the corpus can be severed from the other at his death, the administration under the statute of 1860 is very simple. But if (as he may) he devise it by way of successive estates, or interests, the task of distribution between his next of kin and the charitable societies to whom he has bequeathed in excess of his powers may be somewhat more difficult. Still it is not impracticable.

It should be adjudged that the four societies will not be entitled to receive a greater sum in the whole, from the proceeds of the sale directed by Folkerd C. Sebring's will than would be sufficient, on a proper calculation, to pay and satisfy at that time a debt then yet remaining unpaid, which, at the testator's death, was equal in amount to the then value of one-half of the testator's estate, over and above his debts.

And also, that if there should be any residue of such proceeds, the costs awarded in the court below be paid out of the same; and the balance thereof distributed to the next of kin of the said testator, in the proportions specified in the judgment of the general term.

With these modifications, the judgment appealed from should be affirmed.

These are my views of this case, and my brethren concur in them, with this exception:

They are of the opinion that the case of *Van Derzee v. Van Derzee* (36 *N. Y.*, 231) controls and requires a decision that Folkerd C. Sebring took a life estate only.

I am unable to acquiesce in that conclusion. But it follows that the judgment of the general term, so far as it holds that Folkerd took a fee, must be reversed; and that

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with the modifying adjudication above suggested, the judgment must be in all other respects affirmed.

None of the parties are to have costs on this appeal, and the proceedings are remitted to the supreme court, with directions to enter judgment accordingly.

Judgment that Sebring took only a life estate, and that on his decease the estate in the thirty acres mentioned descended to the heirs of his father, as in case of intestacy.

VAN KLEEK *against* LEROY.

Court of Appeals ; September Term, 1867.

EVIDENCE.—FRAUDULENT REPRESENTATIONS.

In an action by a seller of goods to recover them back from the possession of the defendant on the ground that the buyer, under whom defendant claimed, procured the sale, on credit, by fraudulent representations, the plaintiff may prove the fraudulent intent not to pay, either by proof of direct statements shown to be untrue, or by proof of circumstances tending to the same result.

A direct misrepresentation to the plaintiff having been proved, it is competent to prove similar fraudulent representations made to another person in a different transaction, as bearing upon the question of intent.

Such similar frauds, however, are not *alone* sufficient to sustain a recovery, even if it be shown that the representations were communicated to the plaintiff, and that he acted on the faith of them, unless it be also shown that the buyer, in making such representations, intended them to be so communicated.

Appeal from a judgment.

This action was brought by William H. Van Kleeck against Philip Leroy and William H. Deyo, to recover certain goods, on the ground that they had been purchased by William F. Leroy, under fraudulent representations as to his circumstances and responsibility.

A few weeks after the purchase, Willim F. Leroy made an assignment to the defendants for the benefit of his creditors. The property, which consisted of groceries, &c., was replevied from the defendants shortly after the assignment.

It appeared on the trial that William F. Leroy had for some time been dealing with the plaintiff, and purchasing on credit. That on the 5th of December, 1860, he purchased the goods in question. That, at the time of the purchase, William F. Leroy remarked to the plaintiff, that he was responsible for all the goods he would buy, and was good enough for it.

The plaintiff made inquiries of other persons about him, among whom was a Mr. Kenworthy. Before he sold him the goods, Leroy had been inquired of by Kenworthy, with reference to a bill he (Kenworthy) was about to sell him, and Leroy informed him that he was worth \$2,000 or \$3,000, and was perfectly good.

The jury found a verdict for the defendants.

The only exception was to the charge of the court, respecting the representations to Kenworthy. The judge charged as follows :

1. That the action was brought to test the title to the property replevied.

2. If the goods were procured from the plaintiff upon false and fraudulent representations by Leroy, of his solvency, no title passed, and the plaintiff was entitled to recover.

3. That if the plaintiff made, or was influenced to make the sale, upon the strength of the representations made to Kenworthy, the sale was not for that reason fraudulent, unless the jury further believed that the representations were made to Kenworthy with intent that the same should be communicated to the plaintiff, and should influence his conduct.

To the latter part of the third item of the charge the plaintiff excepted.

The supreme court at general term in the third district affirmed the judgment in favor of the defendants, rendered

upon the verdict at the circuit; and the plaintiff now appealed to this court.

M. Schoonmaker, for the plaintiff, appellant

Erastus Cooke, for the defendants, respondents.

HUNT, J.—The general principles involved in the question now before us are well settled. A purchase of goods upon fraudulent representations of the situation of the buyer, gives no title to the fraudulent vendee. A purchase of goods, with the preconceived design not to pay for them, is a fraudulent purchase, subject to the same consequences. An actual insolvency at the time of the purchase, but accompanied with an honest expectation, on the part of the purchaser, that he will be able to retrieve his fortunes, and where no representation is made, does not necessarily create a fraud (*Hall v. Naylor*, 18 *N. Y.*, 588; *Nichols v. Pinner*, *Id.*, 295; *Hennequin v. Naylor*, 24 *N. Y.*, 139; *Cary v. Hotailing*, 1 *Hill*, 311).

It has been repeatedly decided in this State that, in such cases, evidence of fraudulent purchases from parties, other than the plaintiff, might be proved on the trial, to establish the purpose and intent with which the purchase in question was made.

Thus in *Cary v. Hotailing* (*supra*), Judge COWEN said (p. 316): "On questions of intent to defraud, other acts similar to the offense charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed, as that which is in issue, are admissible with a view to the *quo animo*. The case of fraud is among the few exceptions to the general rule, that other offenses of the accused are not relevant to establish the main charge."

In *Hall v. Naylor* (*supra*), Judge COMSTOCK says: "On the trial of such an issue the *quo animo* of the transaction is the fact to be arrived at; and it is, therefore, competent to show that the party accused was engaged in other similar frauds, at or about the same time. The transactions must be connected in point of time, and so similar in their

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other relations that the same motive may reasonably be imputed to them all."

It was accordingly held that a representation made to a former seller, who had become alarmed, but where debt was not due, was not competent evidence.

In *Hennequin v. Naylor* (*supra*), after laying down the general rule, Judge JAMES says: "In cases where there is no overt act of fraud, it is often very difficult to prove a dishonest purpose. In all such cases, instead of proving false representations, or other fraudulent practices, resort is had to various incidents and circumstances which are calculated to exhibit the hidden purposes of the actor's mind. So in this case: Kerr and Adams were not guilty of an overt act of fraud in the purchase of goods sought to be recovered; nor did they make any representations as to their pecuniary condition, and hence proof was made of their pecuniary situation, the facts and circumstances connected therewith, and their acts and conduct in relation to their other purchases, and as to this purchase, in order to determine the motive and intent with which it was made."

In each case, as it is presented in court, a substantial cause of action must be established by the plaintiff. He must prove a purchase and a fraudulent intent existing in the mind of the purchaser, when he purchased the goods, to obtain the property without paying for it. This may be done by proof of direct statements, which are shown to be untrue, or by proof of circumstances tending to the same result. In the case before us, the purchaser made a direct representation, as testified to by the plaintiff, which would have justified the jury in finding that the purchase was fraudulent. The judge charged, in relation to this point, that if the goods were purchased by statements which were false, and known to be so by the purchaser, no title passed."

This was a sound exposition of the law, and was all that either party had a right to ask.

It was said, however, that the purchaser had made a fraudulent representation to Mr. Kenworthy, upon mak-

ing a purchase from him, at about the same time. Proof of this fact was made, and it would have been erroneous to have excluded it. It was competent evidence of a distinct offense, to establish the *quo animo* in the case in hand.

It was not, however, of itself competent to establish the plaintiff's cause of action. On the trial of a prisoner charged with passing counterfeit money, it is competent to prove that the accused offered similar money at about the same time to other persons, but upon the question of intent only. Proof that he attempted to pass his spurious money upon a dozen other persons would afford no legal evidence that he had passed it to the prosecutor, or that it was spurious. These are the points in issue to be first established by independent evidence, and when established the intent may be aided by the extrinsic transactions. There is no legal connection between an attempt to cheat one person and an attempt to cheat another. Nor is there any legal objection to the idea that a counterfeiter or a purchaser may intend to cheat one person, and not wish or intend to cheat another.

The fraud upon the plaintiff here must be established by competent proof. An attempt to defraud Kenworthy affords no legal evidence that the same man attempted to defraud Van Kleek. An undisciplined mind might say that if Leroy would cheat one man, he would cheat another; and it appearing that he cheated Kenworthy, I will assume that he cheated the plaintiff. This, however, is neither law nor logic.

The authorities I have cited show that this fact was competent to be proved, as bearing upon the motive and intent of Leroy in making the purchase. It was a balanced case. The plaintiff proved representations, as well as numerous facts and circumstances, tending to show that Leroy intended to defraud him in making the purchase.

The defendants showed various facts and circumstances tending to re-establish the good faith of the purchase. That being the precise point in the controversy, it became

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quite important to establish the fraudulent representations to Kenworthy.

If he had attempted to cheat him, the jury would give such effect to that fact as they thought proper, in determining the question of good or bad faith then before them. This fact the jury had, and this was all they were entitled to.

To hold that the fraud upon Kenworthy, which was not committed upon the plaintiff, and the statement upon which it was based, was intended by the purchaser to be communicated to him, established the plaintiff's cause of action, would be going beyone any reported case, and beyond all sound principle (*Allen v. Addington*, 7 *Wend.*, 9).

The representations must be made to the seller (when representation is the mode of fraud resorted to), or must have been intended to be communicated to him. Statements to a stranger, not intended for the plaintiff, cannot give a ground of action. Each case depends on its own circumstances, and must be decided upon its own facts.

The judgment should be affirmed.

GROVER, J. (dissenting).—The question for the determination of the jury in this case was, whether Leroy purchased the goods in question with the fraudulent intent of not paying therefor, and thus of defrauding the plaintiff of their value. The plaintiff, among other things, gave evidence tending to show that Leroy, at about the time of the purchase in question, purchased goods of one Kenworthy, and, as an inducement to Kenworthy to make the sale, made false and fraudulent statements as to his pecuniary circumstances and ability to pay for the goods so purchased, which statements were communicated by Kenworthy to the plaintiff before the sale to him.

The judge charged the jury, that if the goods were purchased by Leroy of the plaintiff, upon false and fraudulent statements to him by Leroy, he knowing them to be

false, and that he procured the goods upon such false representations, no title passed.

The judge further charged, that if the goods were sold by the plaintiff to Leroy, upon the strength of the representations made by Leroy to Kenworthy, or the plaintiff was influenced to make the sale by such representations to Kenworthy, the sale is not for that reason fraudulent, unless the jury further believe that such representations to Kenworthy were made by Leroy to be communicated to the plaintiff, and with the intent to influence the plaintiff to give him (Leroy) credit.

The plaintiff's counsel excepted to this latter portion of the charge. Had the action been to recover damages of Leroy for inducing the plaintiff to sell him goods upon credit, by false and fraudulent statements, this portion of the charge would doubtless have been correct. In such a case, the statement must be made to the plaintiff, either by the defendant himself, or by his authority. But this was an entirely different case. The question in this case was whether the defendants made the purchase in question with the fraudulent intention of cheating the plaintiff out of his goods, by not paying therefor.

In this class of cases, other purchases made fraudulently so near the time of the one in question that the purchaser may be presumed to have acted upon the same design, may be given in evidence to show the intention with which the one in question was made, or, at least, as reflecting some light as to such intention (*Hall v. Naylor*, 18 N. Y., 588, and cases cited). For this purpose it is immaterial whether the statements made upon the other purchases were communicated to the vendor previous to the sale or not. True, if made with the design of their being communicated, it might add somewhat to the force of the evidence; but even this might depend upon other circumstances. In the present case, from that portion of the charge not excepted to, taken in connection with that excepted to, the idea conveyed to the jury was, that the fraudulent statements made to Kenworthy, upon the purchase from him, were not material, unless communicated

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to the plaintiff, by the authority of Leroy, previous to the purchase from him. This was error.

All the judges, except GROVER J., were in favor of affirmance.

Judgment affirmed.

MELVIN *against* WOOD.

Court of Appeals; June Term, 1867.

BILL OF PARTICULARS.—AMENDMENT.

A bill of particulars annexed to the complaint forms part of it, and is amendable accordingly.

A referee has power, on the trial of the issues, to allow a new bill of particulars to be substituted for that annexed to the complaint.

Appeal from a judgment.

This action was brought by Austin Melvin and others, plaintiffs and respondents, against James Wood, defendant and appellant.

The plaintiffs claim to recover in this action a balance of account due them from the defendants, copartners, transacting business under the name of Samuel Barker. The referee before whom the action was tried found the following facts:

1. At the times in said report mentioned, the plaintiffs were, and still are, copartners in business in the city of New York, under the firm name of Melvin & Danforth.

2. On the 1st day of April, 1859, the defendants became copartners in the business of tanning hides and skins in the Highland Tannery, Newburg, Orange county, under the firm name of Samuel Barker; and such co-

partnership continued from said 1st day of April, 1859, until after the 5th day of November in the same year.

3. That between the 9th day of April and the 5th day of November, 1859, both inclusive, the plaintiffs, at the request of the defendant, sold and delivered to them, on divers days, hides and leather, and lent and advanced to them cash, amounting altogether, to the sum of \$9,134.80, as now particularly appeared in a schedule annexed to his report, marked A.

4. That during the times aforesaid, and on divers days after the dissolution of defendants' said firm, prior to July 10, 1860, the plaintiffs received from defendants, for sale on commission, for account of said defendants, divers quantities of leather, and sold the same for defendants' account, and credited the defendants with the net proceeds thereof; and that during the same period they made certain allowances as credits to said defendants, on account of damages on hides sold them, and of a small balance due from the said plaintiffs to defendant Barker, at the date of the formation of said firm of Samuel Barker.

5. That the net proceeds of such sales, including said allowance, after deducting all commissions, charges, disbursements, and allowances, amounted to the sum of \$7,521.99, and the items of said credit were stated in detail in said Schedule A.

6. That by agreement between plaintiffs and defendants, the defendants were to be charged with interest on sales from the time when the same became due, and on all moneys advanced, from the date of such advance, and were to be credited with interest on all proceeds of sales for their account from date of realizing said proceeds; and on the 10th of July, 1860, the balance of interest on said accounts of debits and credits was in favor of plaintiffs, and amounted to \$184.32, and there was then due from defendants to plaintiffs, on said account, a balance of principal and interest amounting to the sum of \$1,797.13.

7. That on said 10th of July, 1860, payment of said balance was demanded of said defendant Wood.

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8. That no part of said balance had been paid by said defendants to said plaintiffs; but that the whole amount thereof was due from said defendants to said plaintiffs, with interest thereon from said 10th day of July, 1860.

The referee accordingly reported, as a conclusion of law, that the plaintiffs were entitled to recover that sum, and judgment was thereupon entered in favor of the plaintiffs therefor, and on appeal the same was affirmed by the general term.

The defendant Wood now appealed to this court.

A. J. Parker, for the defendant, appellant.

I. H. Reynolds, for the defendants, respondents.

BY THE COURT.—DAVIES, CH. J.—Upon the facts found by the learned referee, the judgment in favor of the plaintiff for the amount thereof was clearly correct, and must stand, if no errors were committed upon the trial. This I understand to be conceded by the learned counsel for the appellant, and he therefore proceeds in his brief to point out the several erroneous rulings which, in his opinion, he thinks the referee made upon the trial. [After disposing of an unimportant question of evidence, the learned judge proceeded as follows:]

2. It is objected that the referee erred in allowing the plaintiffs to amend their bill of particulars. To the complaint was annexed, and served therewith, an account of the defendants with the plaintiffs, appropriately designated as a bill of particulars. It formed a part of the pleadings in the action. Upon the trial, the counsel for the defendant Wood moved for leave to amend his answer, so as to conform the second and third heads of the defense, and particularly the counter-claims, to the testimony already given, and particularly to the testimony of Samuel Barker. The referee decided to allow the amendments to the answer of the defendant Wood, as proposed by his counsel, and thereupon the same was amended accordingly. The plaintiffs' counsel then moved for leave to amend the complaint by substituting, in the place of the original bill of

particulars, a new bill of items filed with the referee, to which the counsel for the defendant Wood objected ; and the referee overruled the objection, and allowed the amendment to the complaint ; and to this decision the counsel for the defendant Wood then and there excepted.

Sections 169 and 173 of the Code fully authorized the referee to amend the pleadings of the respective parties in this action, and we do not regard his rulings in this respect open to review in this court. It was a matter resting in the discretion of the referee, and we think it was properly exercised in the present instance. We think it hardly lies with the defendant to object that the same favor was allowed to the plaintiff which he asked for and was accorded to himself, particularly as the very amendments to his pleadings, which he made by leave of the referee, probably necessitated and called for amendments on the part of plaintiffs. The privilege which was conceded to one party was properly granted to the other, and we see no error in the referee's rulings on this branch of the case.

It is urged that the referee improperly excluded evidence of the contents of the books of the defendants. We are not favored with an authority or a principle whereby it is established or shown that the books of a party can be adduced as evidence on his own behalf, and made testimony against his adversary. Such books are but the acts and declarations of the party making them, and upon no rule of evidence can they be competent testimony on behalf of the party keeping and making them. The referee properly excluded them.

[The remainder of the opinion relates to unimportant questions of the admissibility of testimony.]

Judgment affirmed.

MOSER *against* POLHAMUS.*Supreme Court, First District; Special Term, Sept., 1868.*

INJUNCTION TO STAY PROCEEDINGS AT LAW.

Although the supreme court ought not to grant an injunction to stay the prosecution of an action pending and undetermined in a court competent to give full relief,—yet after judgment in such an action, it may in a proper case sustain an action to impeach such judgment and restrain its enforcement.

But the fraud relied on as the ground for such relief must not only be plain and palpable, but the evidence by which it is to be proven must be clear, positive, and entirely credible.

An injunction should be dissolved, upon a motion either to continue or to dissolve it, if upon all the evidence then disclosed, the court would not have granted it in the first instance.

Motion to continue a preliminary injunction.

This action was brought by William Moser and William J. Ree, against James A. Polhamus and Eugene J. Jackson. The defendants had previously brought an action against the plaintiffs, in the New York superior court, to recover for an alleged breach of duty in the sale and purchase of stocks, in which action, on the report of a referee to whom the issues had been referred, they obtained a judgment against the plaintiffs in the present action for upwards of \$125,000.

Judgment having been entered, the judgment debtors commenced the present action in the supreme court, and obtained a temporary injunction against the enforcement of execution.

E. W. Stoughton, E. Pierrepont, and Mr. Godfrey,
for the plaintiffs.

Sandford & Traphagen, and James T. Brady, for the
defendants.

CARDOZO, J.—If the original action in the superior court had been tried before me, it is not certain, especially in view of the fact that the burden of proof rested upon the plaintiffs therein, that, even expunging the evidence of Britton and Carroll as wholly unworthy of credence, I should have reached the same conclusion as the referee did. It is quite certain that had the motion for reference been addressed to me it would not have been granted, and also that if I were now sitting merely to review the referee's report I should not permit it to stand. I do not mean to say that the court has not jurisdiction to grant a reference in the action, but I do mean that within all the authorities the power ought not to have been exercised, because even if an account had to be taken, the trial involved "difficult questions of fact," and in such cases a reference should always, according to the practice as it has existed ever since the statute authorizing references was passed, be refused. Indeed, if ever there were a case which, because of the nicety of the only question really involved, or seriously litigated, the trial of the issue, should have been in open court, before a jury, the one out of which this action has arisen is that case. The question really turns upon so nice and difficult a point as this, substantially, but briefly stated ; whether Ree, in giving an order for the purchase of stocks in Moser's presence, spoke in the singular or plural number. A question so nice and difficult should have been left to a jury, and if, which the evidence on the trial disclosed is not the fact, the taking of an account became necessary, after the verdict was rendered, to enable the court to determine the amount of the judgment, that matter could have been referred, after the real issue had been tried in the only fitting tribunal. Such would have been the proper practice.

With these views of the impropriety of trying the cause out of court, it will easily be understood that were I reviewing the judgment of the referee, I should scrutinize very carefully the case disclosed before him, and, unless the evidence were overwhelming in favor of the report, I should set it aside, and afford Mr. Moser an opportunity

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of trying the merits before an appropriate tribunal. Without discussing the evidence in the superior court, or giving the views that occurred to my mind upon it, the following prominent facts may be stated: That the report was very large, being for \$125,652.57; that although the time when the cause was submitted does not distinctly appear, yet from the fact that Mr. Sandford's printed argument bears date November 19, 1867, it must have been about that time; that the referee reported on the 4th day of December, without giving any opinion showing how or why he reached his conclusions; that thus it appears that this important case, comprising more than fourteen hundred folios of evidence, was under consideration not more than fifteen days. Included in the report was a sum of \$7,000, as to which it is not denied there was no evidence whatever to support it. This great oversight, in a case of such importance, involving so large an amount, occasions in my mind so much distrust of the accuracy of the report, so great fear that the case was too hastily considered, when a report which was to take \$125,000 from a man was made within so brief a period, without any explanation of the reasons which led the referee to take the view he did of the testimony, that I should have felt called upon, instead of reducing the judgment, to set it aside, and submit the very delicate inquiry presented, to a jury—the tribunal which is the best, as well as the most popular, for the determination of questions of fact. I should have been too apprehensive that the referee had, unintentionally, of course, failed to comprehend the case, to permit any part of his judgment to stand, when it was so clearly erroneous to such a large extent, and I should have felt the less hesitancy about taking that course, because the only harm, in view of the undisputed pecuniary responsibility of Mr. Moser, that Messrs. Jackson and Polhamus could possibly suffer, if they were entitled to recover, would be a little delay, which would be of trivial consequence, in comparison with the careful administration of justice.

But however forcibly these considerations may impress me, upon the present application, they do not furnish any

ground for relief. The only ground upon which relief can be claimed here is, that the judgment was obtained by fraud. There can be no doubt of the jurisdiction of this court to entertain an action like the present. That such a bill might have been filed in the late court of chancery was not disputed on the argument, and is undeniable, and all the powers which that court could exercise are now vested in this court, which has "general jurisdiction at law and in equity." The case of *Grant v. Quick* (5 *Sandf.*, 612), cited by the learned counsel for the defendants, does not conflict with these views, and has no application here. That case only holds that while a suit is pending and undetermined in one court, competent to give full relief, no other court should interfere. But in this case the suit in the superior court was ended before this action was brought.

But there is an insuperable difficulty to the granting of this motion, resting upon the failure of the plaintiff to support by credible evidence the allegations of fraud which he makes. A judgment—in a court having jurisdiction of the persons of the parties and of the subject-matter—after a regular trial, sustained upon appeal to the general term, has been obtained in the superior court against Mr. Moser by the present defendants, Messrs. Jackson & Polhamus. To justify the court of chancery, or this court, as its successors, in preventing the enforcement of that judgment on the ground of fraud in obtaining it, the fraud charged must not only be plain and palpable, but the evidence by which it is to be proven must be clear, positive, and entirely credible. Presumptively that judgment is valid, and the burden of impeaching it rests upon present plaintiff. He can overthrow it only by the clearest, most positive and perfectly credible testimony, and if I am convinced that, however free from fault I may believe him to be, he has the misfortune not to have credible witnesses to establish his allegations, then the judgment, which imports verity, must stand against him, and if I can see that such should be the result, if the case was now

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being tried, then I ought not to continue the temporary injunction.

When a motion is made either to continue or to dissolve an injunction the question is, would the court, having before it all the evidence disclosed in the hearing of the motion, have granted the injunction in the first instance? If it would not, then the injunction should be dissolved.

Now, the fraud charged by Mr. Moser is attempted to be proven by the evidence of Ree, Britton, Carrol, Potter, and Mallison. It is unnecessary to repeat here why Ree's evidence could not be regarded. The learned counsel for the plaintiff, with characteristic frankness, very early in the motion, admitted that it should have no weight with me. As to the four other persons, probably never before was such an exhibition made in a court of justice, and I trust there never will be again. Not only did these men make several contradictory affidavits, but they appeared in court, before me, and on oath confessed that they had willfully and deliberately sworn in some of the affidavits to things they knew to be untrue. I can not, as the learned counsel for the plaintiff eloquently urged me to do, take into consideration what, he argued, were the means resorted to to get these men to contradict their first set of affidavits. I do not stop to inquire whether the counsel's deductions from the evidence in that respect be sound or not. Here they can be of no importance, because if threats or any other means would induce those people to perjure themselves, I can not believe them at all. That is the difficulty with the plaintiff's case. His witnesses are wholly unworthy of belief, and being so, must be discredited; and being discredited, the judgment of the superior court stands unimpeached, and, standing unimpeached, its enforcement should not be further prevented.

For these reasons, the motion to continue the injunction must be denied and the preliminary injunction vacated; but from what I have said, it is plain that in my opinion it should be done without costs, and with leave to the plaintiff to discontinue this action without costs, and

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the defendants must stipulate not to move for leave to sue the undertaking given upon the granting of the temporary injunction, and not to bring any action for damages on account of it.

Respecting the course to be pursued as to the persons who made the affidavits referred to, and any further investigation which I may think proper to be made in regard thereto, I have concluded to hand all the original papers to the district-attorney for his action, making to him such suggestions as I deem the circumstances demand.

Ordered accordingly.

MORRIS *against* MORANGE.

Court of Appeals ; March Term, 1863.

APPEAL.—FINAL JUDGMENT.—TIME FOR GIVING NOTICE.

The usual decree for a sale, in an action to foreclose a mortgage, directing the premises to be sold by the sheriff, and a judgment for any deficiency that may arise to be docketed by the clerk, is, before those proceedings are had, a "final judgment," within the provisions of the Code as to appeals. *

A judgment is to be regarded as interlocutory, only when it reserves something for the court judicially to determine.

Appeal from an order.

This action was brought to foreclose the defendant's equity of redemption in mortgaged premises. On the 10th of February, 1863, a judgment was entered at special term,

* To the same effect are the following cases, arising under the provisions of the acts of Congress allowing a review of final judgments and decrees, by the supreme court of the United States: *Whiting v. Bank of United States*, 13 *Pet.*, 6; *Bronson v. Railroad Co.*, 2 *Black*, 524; *Milwaukie, &c. R. R. Co. v. Soutter*, 2 *Wall*, 440.

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directing a sale of the premises for the satisfaction of the debt, with the costs and expenses of the action, and that the defendant pay any deficiency which might appear after the sale.

In pursuance of the judgment, the premises were duly sold by the sheriff of Kings County, in which they were situated. The sheriff made his report of sale May 25, 1864, and stated therein that the deficiency amounted to \$1,024.47. The report was filed in the office of the clerk of Kings County, and an order was entered confirming it, May 26, 1864, and the deficiency docketed by the clerk May 27, 1864.

Notice in writing of the judgment was served personally on the defendant on the 16th of February, 1863, and on his attorneys on the next day. A notice of appeal from the judgment was deposited by defendant in the post-office in New York, March 19, 1863, addressed to the plaintiff's attorneys at Brooklyn, and another addressed to the clerk of Kings County, Brooklyn.

The notice of appeal was set aside by an order of the court, at special term, on the ground that it was served too late upon the clerk, which order was afterwards affirmed by the general term.

No written notice of the order confirming the report of sale, and stating the deficiency, was given until November 25, 1867, although the defendant had served on the plaintiff's attorneys a notice of appeal from the said order on November 23, 1867.

H. E. Davis, for the defendant, appellant.—I. The time limited for an appeal is thirty days after written notice of the judgment (*Code of Pro.*, § 332; 13 *How. Pr.*, 423; 14 *Wend.*, 529; 6 *Paige*, 127). Formal notice is necessary (9 *Id.*, 607; 7 *Abb. Pr.*, 352; 14 *How. Pr.*, 522).

II. The order cannot be sustained on the theory that as the time limited for an appeal from the order of sale had expired, therefore the appellant could not appeal from the judgment for the deficiency. 1. Section 329 of the *Code*, and section 11, subd. 1, contemplate that the appeal is to be taken *from the judgment*; and on such appeal, the

court may review any intermediate order involving the merits, and necessarily affecting the judgment. 2. The judgment here contemplated is the final judgment in the action, which contains the final action of the court upon the cause, and upon which process is to be issued to enforce the same (14 *Wend.*, 539, 542-4; 1 *Comst.*, 423; 34 *Barb.*, 69; 45 *Id.*, 348; 42 *Id.*, 441; 19 *N. Y.*, 534; 12 *N. Y.* [2 *Kern.*], 591; 4 *N. Y.*, 415; 2 *Abb. Pr. N. S.*, 454). 3. The order for sale is essentially interlocutory. The land is but a pledge; it may be of no moment to the mortgagor that it be sold; but when a judgment is docketed against him, a substantial right is affected, and the law secures him the right to appeal therefrom.

Theodore F. Jackson, for the plaintiffs, respondents, relied upon *Johnson v. Everett* (9 *Paige*, 638), and *Mills v. Hoag* (7 *Id.*, 19).

CLERKE, J.—Defendant insists that the judgment entered February 10, 1863, was only interlocutory, and that the judgment did not become final until the entry of the order confirming the report of sale, May 27, 1864; and as he had received no written notice of this order until November 23, 1867, his notice of appeal on the 23d was effectual.

The question, then, arising on that motion is, whether the judgment entered February 10, 1863, was interlocutory or final, or whether it became final only on the entry of the order confirming the report of sale.

As a general rule, undoubtedly, when a judgment or order directs a reference, although it provides for the decision of the main questions at issue, it is deemed interlocutory.

But I think this can only be when there is something reserved for the court judicially to determine. In the present case the court determined all that it was necessary to determine judicially, by the judgment of February 10, 1863. There was nothing more for it to decide. What was left was to be done by its ministerial officers.

The sheriff sent in his report, which was filed, and an order was entered, as of course, confirming it. The docket

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of the deficiency by the clerk is merely a clerical act in performance of the directions of the judgment entered in the order of February, 1863.

In *Mills v. Hoag* (7 *Paige*, 18), the chancellor says: "The usual decree in mortgage cases, for the sale of the property and the distribution of the fund among the parties and finally disposing of the question of costs, is a final decree....., and is constantly enrolled as such; although the master's report of the sale and distribution may be excepted to if it is erroneous, and it may require a subsequent order of the court to dispose of the questions which may thus arise."

In *Johnson v. Everett* (9 *Paige*, 636), a decree was made by the vice-chancellor of the 7th circuit, declaring the rights of the parties, and directing an account in conformity therewith, but reserving the consequential directions and the question of costs until the coming in of the master's report.

The decree was entered January 5, 1842, and on the 28th of the same month a copy thereof was served on the solicitor of the defendants, whose appeal was not entered until some time in the following May. The only question therefore was, whether the decree was final as to the appellants, or was an interlocutory decree, from which they should have appealed within the fifteen days allowed by the statute for appealing from interlocutory orders and decrees of the vice-chancellor. The chancellor decided that the decree was interlocutory, on the ground that further directions, and the question of costs, were reserved until the coming in of the master's report. "But (he adds) "if the decree, in addition to the reference to the master to compute," &c., "proceeds further, and gives the usual directions in such cases, that upon the coming in and confirmation of the report of the master, the premises shall be sold, and that the master.....pay the amount.....out of the proceeds of such sale, and directing the mortgagor to pay the deficiency.....—the decree is final; although the mortgagor may have the right to except to the master's report of the amount due.

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The case before us is still stronger. The action of the sheriff was purely ministerial. No exception could have been taken to his proceedings, so that they could be reviewed judicially. His duty was merely to enforce the judgment, and to render a report of his action, which was to be filed with the clerk without any further judicial intervention of the court.

It may be proper to add that the reasoning by which I have arrived at this result in no respects conflicts with the recent decision of this court in *Clark v. Brooks* (2 *Abb. Pr. N. S.*, 385).

The judgment appealed from in that case was purely interlocutory; there were questions expressly reserved for the further adjudication of the court—questions upon which the intervention of the judicial action of the special or general term was indispensable before a final judgment could be entered.

The order should be affirmed, with costs.

WOODRUFF, GROVER, MASON, MILLER, and WRIGHT, JJ., concurred.

CLARK *against* TUNNICLIFF.

Court of Appeals; January Term, 1863.

SCHOOL LAWS.—COSTS AGAINST OFFICERS.—CERTIFICATE OF GOOD FAITH.

An erroneous decision of the trustees of a school district in the assessment of a tax, is a proper subject of appeal to the superintendent.

Hence, if any person, whether a resident or not, aggrieved by a levy on his property under such assessment, sues the officers, instead of taking such appeal, he may be refused costs, if the judge certify that the defendants acted in good faith, &c.

Of the intent and effect of the sections of the Code of Procedure giving costs to the successful party.

Clark v. Tunnicliff.

A general certificate of good faith, &c., granted under the statute, will exonerate the defendants from costs of an unsuccessful motion for a new trial, previously made and denied with costs.

Appeal from an order.

This action was brought by George Clark against George Tunnicliff and Henry H. Rathburn, to recover damages for taking and converting a horse of the plaintiff.

The defendants attempted to justify by showing that they were trustees of a school district; that a tax was voted by said district; that as trustees they assessed such tax against the taxable inhabitants of the district, and persons holding land therein, and made out the proper tax-list, upon which assessment and tax-list the plaintiff was assessed for a farm owned and worked by him, as being within the district; and that they annexed to the tax-list a warrant, directed to the collector, who, by virtue thereof, after the plaintiff refused to pay the tax, levied on, and sold the horse in question, to satisfy the tax against the plaintiff.

On the trial it was held that the tax was unauthorized; and the plaintiff had a verdict for \$291.04 damages. Exceptions were taken upon the trial, which were ordered to be heard, in the first instance, at the general term, and a new trial was denied with costs.

After the verdict the defendants' attorney applied to the judge who tried the cause, for a certificate under 2 *Rev. Stat.*, 5 ed., 128, § 198, that it appeared upon the trial that the defendants had acted in good faith, &c., which was subsequently, and after the decision at general term, granted by the judge.

On the adjustment of the plaintiff's costs, they were taxed, including the costs of motion for a new trial, at \$401.34; but the certificate of the defendants' good faith being presented to the clerk, he refused to insert the costs in the entry of judgment. The plaintiff moved, at special term, for an order directing the clerk to insert them, and the motion was denied.

The plaintiff appealed to the court at general term, and the order was affirmed; and now he appealed to this court.

S. J. Burdett, for the plaintiff, appellant.

De Witt C. Bates, for the defendants, respondents,—cited *Laws of 1841*, ch. 180, § 33; 2 *Rev. Stat.*, 5th ed., 128, § 198; *Id.*, 124, § 178; *Exp. Bennett*, 3 *Den.*, 175; *People ex rel. Lumley v. Lewis*, 28 *How. Pr. R.*, 470.

MILLER, J.—The recovery of the plaintiff in this action was had by reason of the illegal proceedings of the defendants as trustees of a school district, in assessing a tax upon the plaintiff, and in collecting said tax by a sale of his property. Ordinarily, a recovery in such an action would entitle a plaintiff to costs; and if the defendants are now exonerated from the payment of costs, it is because they are exempted by section 146, of ch. 480 of the *Laws of 1847*,—which provides that when officers of school districts are prosecuted for any act performed by virtue of, or under color of their offices, which might have been the subject of an appeal to the superintendent, no costs shall be allowed to the plaintiff, where the court shall certify that it appeared upon the trial of the cause that the defendant acted in good faith.

I think the judge who tried this cause at the circuit was warranted in granting a certificate, within the provisions of the section of the act referred to, and that the defendants were thereby relieved from the payment of costs. By section 82 of the act in question, the trustees are required to call meetings, to make out a tax-list of every district-tax voted, and to annex a warrant to any such tax-list, directed to the collector, for the collection of the sum assessed. Another section (85) requires the trustees, in making out the tax-list, to apportion the tax among the taxable inhabitants of the district, and upon the real estate of non-residents liable to taxation. A subsequent section (132) authorizes an appeal by any person conceiv-

ing himself aggrieved in consequence of any decision made in certain cases, which are particularly specified, "or concerning any other matter" arising under the act in question, to the superintendent, who is authorized and required to examine and decide the same, and whose decision is final and conclusive.

The provision of the section last cited, is broad and comprehensive in its terms, and evidently includes any and all acts which may possibly arise in regard to the official proceedings of these officers. It certainly embraces the acts of the defendants in this case, in the assessment and collection of the tax against the plaintiff.

The legislature, no doubt, intended to prevent needless prosecutions, and unnecessary suits against officers of their character, who had acted in good faith in the discharge of their official duties, and, I think, provided an ample remedy for redress in the case before us, without resort to a court of law. The acts of the defendants, for which they were held liable, were for assessing the tax, and instituting and carrying out the proceedings required by law for its enforcement and collection. This clearly was a decision concerning a matter within the letter, spirit, and meaning of the act in question, which it was especially intended to provide for, and the legality of which was litigated upon the trial. The injury to the plaintiff arose in consequence of the decision of the trustees, that the plaintiff was liable to be assessed, and the warrant of assessment issued by them. The levy made upon, and the sale of plaintiff's property was the result of the unlawful assessment made by the defendants. Here was the original grievance for which a complete and perfect remedy was provided by an appeal, and which rendered the commencement of a suit a useless proceeding; nor does it alter the case because the plaintiff was not a resident of the district. The statute does not exclude non-residents whose real estate is liable to tax, but expressly comprehends every person aggrieved.

It was enough that the plaintiff was aggrieved by the decision of the defendants to levy the tax, to bring him

within the provision of the act, and that the whole question involved in the suit brought could have been appealed, heard and decided by the superintendent, instead of being contested and adjudicated in an action in a court of justice. So long as the defendants were acting as trustees of the school district, and were called upon to respond for acts done by virtue of, or under color of their office, and acted in good faith, they presented a case which entitled them to the certificate of the judge who tried the case, and which exonerated them from the payment of costs (*Exp. Bennett*, 3 *Den.*, 175).

It is insisted by plaintiff's counsel that section 304 of the Code allows costs of course to the plaintiff, in a case like the one under consideration; that section 468 of the Code repeals all statutory provisions inconsistent with the Code, and that by means thereof section 146 of the act of 1847 is abrogated and repealed.

I think this view of the subject is not maintainable, and that the position assumed in the opinion of the general term, that the scope of sections 304, 305, and 306 of the Code is to distinguish between the cases in which costs are allowed of course, and those in which they are discretionary, and not to make their allowance peremptory in every case specified in section 304, and that the reason given for upholding it, is a satisfactory and full answer to the ground taken by the plaintiff's counsel. As was well said by the learned judge who wrote the opinion: "The intent is manifest, that in the first class of cases costs are not left to the discretion of the court, while in the latter class they are so left."

This intent is more apparent from the enactment in section 303, which abolishes the fee bill previously existing, and enacts that "there may be allowed" to the successful party "certain sums, by way of indemnity, for his expenses in the action," and afterwards distinguishes the cases in which the costs are allowed of course, and those in which they are discretionary.

It may be also observed, that although costs are allowed to the plaintiff, under section 304, in cases of the

same nature as the present one, and unless the judge interposes and grants a certificate, yet the fact of granting the certificate is not in conflict with this enactment. The party recovers costs of course, unless their allowance is stayed by the certificate, as provided; and this, I think, is only a mere modification of section 146 of the act of 1847, not inconsistent with the Code, and not repealed by section 468 of the Code.

The certificate of the judge applies, I think, to all the costs in the case, and the plaintiff is not entitled to his costs on this motion for a new trial. The exceptions taken upon the trial were first heard at general term, by the order of the court, and the motion for a new trial was only a continuation of the action, and not the institution of a new proceeding by the defendants. The defendants were merely pressing their defense originally interposed, on the hearing at general term, and the certificate of the judge who tried the case was not given until after a decision had been made upon the exceptions. The denial of the motion for a new trial, "with costs," was the usual form of an order in such cases, and not an adjudication that the plaintiff was entitled to costs, and which would preclude the defendants from obtaining the certificate. The plaintiff in such a case would be entitled to costs, as a matter of course, upon the decision, the same as he would upon a verdict at the circuit, and therefore the form of the order was not inappropriate, but the granting of the certificate prevented the allowance of the costs, by the clerk, upon taxation.

As the views expressed are against the plaintiff upon the question raised, and necessarily lead to an affirmance of the order of the general term, it is not necessary to discuss whether the order of the general term was of such a character as to authorize an appeal to this court.

Order appealed from affirmed.

WAFFLE *against* DILLENBECK.*Court of Appeals; January Term, 1863.*

TRIAL.—CHARGE AS TO COSTS.

In an action for unliquidated damages for a tort, it is not error for the judge to instruct the jury as to the amount necessary to be recovered in order to entitle the plaintiff to costs.

Appeal from a judgment.

This action was brought by John Waffle against John Dillenbeck, to recover damages for an assault and battery. It was tried at circuit, before Mr. Justice CAMPBELL, in December, 1861, in the county of Otsego.

In charging the jury, his honor said to them, that "if their verdict should be for the plaintiff, the amount of it was purely for their consideration"; and he then stated to the jury, "that a verdict for less than \$50 damages would not entitle the plaintiff to recover against the defendant any more costs than damages; and a verdict for the plaintiff for \$50 or more, would entitle the plaintiff to recover all the legal disbursements and costs of prosecuting the action."

To this part of the charge the defendant excepted.

The jury found a verdict for the plaintiff for \$50 damages, and judgment was entered for \$148.66, damages and costs. The opinion of the supreme court is reported in 39 *Barb.*, 123. The defendant now appealed to this court.

Countryman & Moak, for the defendant, appellant.—

I. The judge erred in charging the jury in reference to costs. It may have erroneously misled the jury into the belief that the question was a proper one for their consideration. Costs are an incident to the verdict, and are

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governed by that, and not the verdict by the costs. A party can only recover such damages as are the *legitimate* result of an injury. Damages must be the legal and *natural* consequences of the act complained of (*Sedgw.*, 58, 584). The charge of the judge amounts to this: had no suit been brought, the damage may have been \$25; but as the plaintiff has sued, you may give him \$50. The jury are to determine the damages from the circumstances of the injury. When that is done, their duty is ended (2 *Greenl. Ev.*, § 89; 4 *N. Y.*, 160). The right of the party to damages is fixed before suit; the verdict is simply a conclusive determination of that right (15 *Abb. Pr.*, 345; 6 *Hill*, 250). The statute restriction as to costs is founded on public policy of restraining petty litigation, with which juries should not be allowed to interfere. If the judge charge the jury on some matter *not* legitimately within their province, even though he state the law correctly, the judgment must be reversed, if the party excepting may have been injured thereby. The error is not in the principle of law, but in the instruction to the jury that it is proper matter for their deliberation (15 *N. Y.*, 524; 12 *Barb.*, 84, 94; 1 *Den.*, 583; 1 *Wend.*, 510, 514).

II. What is said on the point in *Elliott v. Brown* (2 *Wend.*, 497), is *dictum*, without the support of authority or reason. *Nolton v. Moses* (3 *Barb.*, 34) is founded on that *dictum*. Moreover, that case has been substantially overthrown by *Hicks v. Foster* (13 *Barb.*, 663), and *Lincoln v. Railroad Co.* (23 *Wend.*, 425); and see *Van Horne v. Petrie* (*Colem. & C. Cas.*, 390), and *Seaman v. Bailey* (*Id.*, 391). Compare, also, *Dain v. Wyckoff* (7 *N. Y.* [3 *Seld.*], 191; 18 *N. Y.*, 47); *Palmer v. Haskins* (28 *Barb.*, 90); *Myers v. Malcom* (6 *Hill*, 692). We can find no authority without our State in support of the doctrine of the charge (*Platt v. Brown*, 30 *Conn.*, 336; *Poole v. Whitcombe*, 3 *Foster & F.*, 71). In *Wakelin v. Morris* (2 *Id.*, 26), the court refused to tell the jury what sum would carry costs. .

De Witt C. Bates, for the plaintiff, respondent;—relied on *Elliott v. Brown*, and *Nolton v. Moses*, *supra*.

BACON, J.—This case presents but a single question, arising upon the charge of the judge at the circuit, before whom the cause was tried. The action was for an assault and battery; and after the parties to the suit had fully testified to the circumstances of the affray and the amount of punishment inflicted upon the person of the plaintiff, with one or two corroborating witnesses on each side, the judge charged the jury that, if their verdict should be for the plaintiff, the amount was purely a question for their determination. He then added, that a verdict for less than \$50 damages would not entitle the plaintiff to recover full costs, nor any more costs than damages, and that a verdict for the plaintiff for \$50, or more, would entitle plaintiff to recover all the legal disbursements and costs of prosecuting the action. To these propositions counsel for defendant excepted, and then requested the court to charge the jury that, in arriving at their verdict, if they found for the plaintiff, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs. The court declined thus to charge, and the defendant's counsel excepted.

The jury found a verdict for \$50, on which judgment with costs was entered up, and, on appeal to the supreme court, the judgment was affirmed, sustaining the ruling of the court; and the defendant now comes by appeal to this court.

The request of the defendant's counsel to the court, to charge in the language proposed by him, amounted to nothing more than the judge had already charged.

The proposition, as put by the learned judge, was, "that it was right to tell the jury, in an action of assault and battery, in reference to what conclusion they should arrive at on the question of damages, what was the statute of the State in respect to the amount to be recovered to carry costs." This, it is alleged by defendant's counsel, is

error, and the point has been argued with considerable force and a good deal of ingenuity.

As an original proposition, and if the rule were now for the first time to be announced as a question of practice, or indeed of propriety, at the circuit, I should be very much inclined to hold with him; and even now I am by no means sure that it is not a custom which, although it has obtained very considerable, perhaps almost universal sanction at *nisi prius*, is "more honored in the breach than in the observance." In this conclusion some of my brethren do not concur, and it remains only as an expression of my individual conviction on this point. Be this, however, as it may, it can hardly be said to be a practice that so clearly violates any principle applicable to this class of actions—where the damages, when they are awarded, are both punitive and compensatory, and therefore are permitted to take a wide range, and be in some measure indeterminate—that it constitutes an error in law which can be availed of as such to entitle the party to a new trial. The most that can be said, I think, is, that whether the judge shall give such instruction or withhold it, is purely a matter of discretion, depending somewhat, perhaps, upon the character of the case in which the information is given or declined, and not constituting an error in law upon which a valid exception can be taken.

Whatever may be the rule in England (and we have not found any case where the point is specially and sharply presented), yet the practice adopted by the judge on the trial in this case has received so much judicial sanction in this State, that I think it must be conceded that the rule is so far settled with us, that it would be unwise now to disturb it. In *Elliott v. Brown* (2 *Wend.*, 497) the decision rested upon another point, as controlling, but this question was presented in the case. The jury, it seems, propounded an inquiry to the court, as to the amount of damages which it would be necessary to give in order to carry costs. The judge, exercising his discretion in the matter, declined to give them any specific informa-

tion on the subject, not deeming it necessary as an aid in determining their verdict.

In commenting on this, Chief Justice SAVAGE said : "It is the duty of the jury to ascertain what damages the plaintiff has sustained, and also how much the defendant ought to be punished ; and if the jury consider the costs as part of the amount which the defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right to do so. I think, therefore, it would have been proper to have given the jury the information they wanted.

In short, that while on the one hand it was not error to withhold this information, if in the discretion of the judge it does not seem expedient, it is no more erroneous, on the other, but may be a very proper exercise of discretion, to give the instruction sought.

In the case of *Nolton v. Moses* (3 *Barb.*, 31) the question squarely arose at the circuit. The action was slander, and the presiding judge gave the precise instruction to the jury as it was given in this case as to the effect of a verdict for given amounts upon the question of costs. The defendant's counsel excepted, and then requested the court to charge the same proposition which the judge in the case at bar was requested to give, which was declined, and an exception taken to the refusal.

The court at the general term disposed of it in a few words, indeed, but clearly and precisely, by saying that "It is common experience to apprise the jury as to the effect of their verdict upon the parties in respect to the question of costs : and the practice has been expressly and repeatedly approved."

After these decisions, there being none whatever to the contrary, I think it would be unwise to disturb a practice which has grown into such wide use, and is so generally approved.

It is not, indeed, a case where we might hesitate to change a rule under which important interests or vested rights have intervened, and which would be seriously dis-

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turbed by its reversal ; but as we do not see that the case is one where any question of principle is concerned, we think it better to abide by a rule applicable to that particular class of actions where considerable latitude and a wide margin is given to juries, in respect to the measure of compensation they may award, as well as of punishment they are permitted to administer.

I think the judgment should be affirmed.

MASON, J.—The simple and only question in this case is, whether the judge at circuit committed an error in instructing the jury what damages would carry costs, and also in informing them that for any recovery for less than \$50 the plaintiff could recover no more costs than damages.

The action is assault and battery, and these instructions were correct. Now, nearly forty years ago, Chief Justice SAVAGE, in delivering the opinion of the supreme court in the case of *Elliott v. Brown* (2 *Wend.*, 497, 500), expressed the opinion that it was proper to give the jury such instructions in an action of this kind. And almost twenty years ago it was decided in the supreme court, in the case of *Nolton v. Moses* (3 *Barb.*, 31), that in an action of slander it was proper to instruct the jury as to what sum in damages would entitle the plaintiff to full costs, &c. The question was directly decided in that case, and Judge WILLARD, who at the time, I think, had had a longer experience in circuit than any judge upon the bench in the State, said: "It is common experience to apprise the jury as to the effect of their verdict upon the parties, in respect to the question of costs ; and the practice had been expressly and repeatedly approved."

The practice in the circuit, so far as my acquaintance has extended, has been to give this instruction to the jury in actions of this kind, and for more than twenty years this practice has obtained with me.

The appellant's counsel has argued this question upon his brief with an elaboration and earnestness, as though a great principle was involved, and that it was vital to the

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administration of justice that the jury should be kept in ignorance as to the law of costs in this class of actions. I am not able to perceive any good reason why the jury should not be informed upon the subject, when all the costs under the Code are declared to be given by way of indemnity for the expenses of the party in the action (*Code*, § 303).

The rule having so long obtained with us, I do not think that the appellant's counsel has given us any sufficient reason for changing it, especially as the practice at the circuit in this respect has been expressly approved by the supreme court in *banco* for more than twenty years.

I advise the affirmance of the judgment.

All concurred.

Judgment affirmed.

GARDINER, *against* TYLER.

Court of Appeals; June Term, 1867.

COSTS.—ALLOWANCE OF COMMISSIONS TO RECEIVER.

The settled rule of the courts, to allow to trustees only the same commissions as the statute allows to executors and guardians for similar services, is not applicable to receivers appointed by the court in actions pending therein. *So held*, of a receiver appointed to receive and apply rents pending a controversy arising on the probate of a will.

The receiver being an officer of the court, the court appointing him has authority to determine the rate of his compensation, which may be fixed in reference to the circumstances of the case.

Appeals from orders.

This action was brought by David L. Gardiner against Julia G. Tyler and Harry Beeckman. The facts are stated in the opinion of the court. The cause came up upon ap-

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peals involving the question of the receiver's right to commissions and disbursements.

———, for the appellant.

J. Buchanan Henry, for the receiver and the defendant Tyler.—I. The order, it appears, was entered by consent.

II. The receiver had executed it by payment of the taxes before the notice of appeal, and he should be protected.

III. The order amounted to an arrangement between the parties, which should not now be disturbed.

IV. The payment of taxes inures to the benefit of the plaintiff.

V. The amount of commissions was properly allowed by the court, in the exercise of the discretion it has, in the absence of any statutory provisions applicable to the case.

PARKER, J.—This is an appeal from two orders of the supreme court, made under the following circumstances:

The action was brought for the appointment of a receiver of the rents of the estate of Julianna Gardiner, deceased, pending a contest before the surrogate of Richmond county, respecting the validity of her alleged will, the probate of which was being contested by the plaintiff; and James J. Roosevelt was appointed such receiver, and qualified as such.

The surrogate having decided against the validity of the will, and refused to admit it to probate, an appeal was taken to the supreme court, and the general term in the second district reversed the decree of the surrogate, and sent the case back, with the direction that the will be admitted to probate, which was accordingly done.

At this stage in the proceedings, a motion was made in this suit by the defendants to dismiss the complaint for unreasonable neglect of the plaintiff to proceed in the action, whereupon it was, on the 2nd day of June, 1866, ordered as follows: "That the complaint in the above-en-

titled action be, and the same is hereby dismissed, with costs ; and that all orders heretofore granted as provisional remedies herein are vacated and set aside." No further judgment appears to have been entered in the action.

After the above order was made, and on the 27th of November, 1866, an order was obtained whereby the receiver was directed to pass his accounts before a referee named, and to pay over and apply what the referee should certify to be due from him as receiver, to the satisfaction and payment of the unpaid taxes which were due, and a lien upon the real estate of the said Julianna Gardiner, deceased, situate in the city of New York, prior to her decease ; and that he transfer and deliver to the defendant, Julia G. Tyler, all deeds, leases, and property which may have come into his possession as such receiver. This order, it appeared by affidavits on the part of the defendants, was entered by consent of the plaintiff, given in open court, though not so stated in the order.

The referee therein named proceeded to take the account, and made a report whereby he certified as remaining in the hands of the receiver the sum of \$3,416.72, to be applied to the payment of taxes as directed by said order. In the statement of the account, as allowed, are several items of credit by the receiver to the estate, of rent from G. Bradley, of which the following is a specimen : "By cash from G. Bradley, for rent, \$1,300 ;" and among the items allowed to the receiver are the following : "To cash paid, sundry taxable costs, charges, and disbursements, including attorney's fees, &c., in five foreclosure suits, \$125 ; commissions on \$13,175.93, at 5 per cent., \$658.79."

The plaintiff excepted to the allowance of five per cent. commissions upon the whole amount of the moneys received and paid out ; also to the allowance of \$125 costs and attorney's fees in five foreclosure suits, and claimed that disbursements only should have been allowed ; also "that the referee has reported the sums received for rents from G. Bradley, when he should have reported the sums received from tenants, instead of the sums received for rents, diminished by the charges of said Bradley."

These exceptions were heard before the court, at special term, on the 17th of January, 1867, and were all overruled, except that the one as to the receiver's commissions is so far allowed that the one-third of said commissions allowed over and above the sum of \$251.75 (trust \$135) was deducted from the commissions charged, and added to the balance certified by the referee as in the hands of the receiver, and the report was in all other respects confirmed. From this order of the special term an appeal was taken to the general term, and the order was, on the 18th of April, 1867, affirmed.

This order of affirmance is one of the orders from which the plaintiff has appealed to this court.

In the controversy respecting the will, the judgment of the supreme court, reversing the decision of the surrogate, was, on appeal to this court, on the 2nd of January, 1867, reversed, and thereupon the plaintiff in this action moved the supreme court, at special term, on the 15th of March, 1867, for an order modifying the order of November 27, 1866, so as to direct the receiver to pay the balance in his hands to this plaintiff, instead of paying the same upon the taxes in said former order specified.

This motion was denied, and from the order denying it the plaintiff appealed to the general term, where the order was affirmed.

This order of affirmance is the other order brought here by the appeal.

The appeal from the first-mentioned order brings up for review the exceptions to the referee's report upon the accounting of the receiver.

The exception stating "that the referee has reported the sums received for rents from G. Bradley, when he should have reported the sums received from tenants, instead of the sums received for rents, diminished by the charges of said Bradley," is not founded upon any fact which appears from the papers before us.

The statement in the account, "By cash from G. Bradley, for rent," is the only statement of fact upon the subject, and the legitimate inference from this is that Bradley

was the tenant, and not the middleman implied in the exception.

This exception was, therefore, properly overruled.

In regard to the allowance of the charges in the receiver's account of \$125, for taxable costs, &c., in five foreclosure suits, the exception claiming it to be erroneous, on the ground that disbursements only should have been allowed, assumes that the receiver acted as attorney in those suits, and was claiming the costs and attorney's fees for himself as such attorney.

There is nothing to show that such was the fact, but the inference is, from the terms of the charge, that he paid that amount to some other attorney, for his services as such in the suits. It is not necessary, therefore, to examine the question whether the charge contains anything which the receiver could not properly charge if he performed the service himself, or an attorney of the court. This exception was also properly overruled.

The five per cent. allowed by the referee, as commissions upon the amount received and paid out by the receiver, was not all allowed by the court, and yet the appellant complains that it was not reduced to the rate allowed to executors and administrators, which, he insists, is the legal rate in cases of this kind also.

The statute does not fix the compensation to be allowed to receivers appointed under section 244 of the Code, as this one must have been, except that it is provided in the said section (subd. 4) that receivers of the property, within this State, of foreign corporations, shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed, and non-resident debtors,—which is five per cent. upon the whole sum which shall have come into their hands (2 *Rev. Stat.*, § 31, 1st ed.).

Although in regard to the compensation of trustees, in the absence of any statutory provision therefor, it has come to be the settled rule of the courts to allow only the same commissions as the statute allows to executors and guardians for similar services, I do not think the rule ap-

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plicable to receivers appointed by the court, in actions pending therein. "A receiver is an officer of the court, and, as such, in the absence of legislation, the court has the authority to determine his compensation" (*Magee v. Cowperthwaite*, 10 *Ala. N. S.*, 966; *Edw. on Rec.*, 642). Such is the established rule of the court of chancery in England, where the amount of compensation, or *salary*, as it is called, allowed to a receiver, is often left to the master to fix with reference to the trouble and labor of the case (*Day v. Croft*, 2 *Beav.*, 488; *Potts v. Leighton*, 15 *Ves.*, 273). I do not find that the right of the court to fix the receiver's compensation, when the statute has not done so, is denied by any case in this State; nor do I find that the rate of compensation fixed by the statute for executors and guardians, has, by the courts, been applied to receivers. The course of legislation on the subject indicates, I think, that such rate does not apply; for the legislature has limited the compensation of receivers, in the case of moneyed institutions to the rate allowed by law to executors and administrators (*Laws of 1842*, ch. 3). If that rule applied before, this was unnecessary, and the application of it to that class of receivers alone implies that it is not to apply to any other class.

If the supreme court, which appointed the receiver in this case, had authority to determine the rate of his compensation, as I think it had, there is no error in its exercise, and no error in the order now under consideration.

In regard to the other order, I can discover, from the papers before us, no good reason why it should be reversed. The order of 27th of November, 1866, which the plaintiff sought to modify, directed the receiver to pay over and apply the moneys in his hands upon the unpaid taxes which were due and a lien upon the real estate of the said Julianna Gardiner, situate in the city of New York, prior to her decease; and this direction was made by consent of the plaintiff. Now the plaintiff asks the court to modify that order, and direct those moneys to be paid over to him; and such would be the effect of a rever-

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sal of the order appealed from. The parties to this action are the heirs-at-law of the said Julianna Gardiner, deceased, and no facts are shown why the plaintiff, one of them, is entitled to these rents and profits ; nor why the application of them to the arrears of taxes, to which the order of 27th November devotes them, is not a perfectly equitable disposition of them with reference to the rights of all parties. Moreover, it is shown by the affidavits on the part of the defendants, that another action is pending in the supreme court, involving the question of the plaintiff's right to them.

Under such circumstances the supreme court was right in refusing to modify the order, as moved for by the plaintiff.

The orders appealed from should be affirmed, with \$10 costs.

All the judges concurred.

Order affirmed.

FOSTER *against* VAN WYCK.

Court of Appeals ; June Term, 1867.

REMEDY FOR ERRONEOUS TAXATION.

Tax assessors having jurisdiction of the person and of the subject-matter—that is, taxation of property—and invested by the statute with authority to decide what property is taxable and what exempt, act judicially in so deciding ; and an assessment, though clearly erroneous in overruling a claim of exemption, is not void.

It makes no difference whether the claim of exemption arises from State or national law.

The determination of the assessors to impose a tax is a judicial determination ; and an error therein, although it may be corrected by an appropriate proceeding, does not lay the foundation for an action at law by the person assessed to redress the alleged injury.

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Appeal from judgments in controversies submitted without action.

Three cases were submitted to the supreme court for decision, upon a statement of facts, without action, under the provisions of the Code of Procedure.

The first was a claim by Charles W. Swift against the city of Poughkeepsie.

The second, by George Van Kleeck against Frederick Woodruff, collector of taxes of the city of Poughkeepsie.

The third, by David C. Foster against Cornelius Van Wyck and others, assessors of the same city.

The facts, which, with the exception of the relation which the respective defendants sustained to the transactions, were substantially the same, are stated in the opinion of the court.

The plaintiffs appealed to the court of appeals from judgments in favor of the defendants, which had been rendered in each case in the supreme court.

John Thompson, and Joseph H. Jackson, for the plaintiffs, appellants.—I. The tax was not assessed and collected according to law (*Churchill v. City of Utica*, 33 *N. Y.*, 162, reversed in supreme court of the United States).

II. The tax being clearly illegal, its collection was a trespass; and the city having received the money, as well as authorized its collection, are liable for money had and received; and the collector and assessors are *particeps criminis*. 1. The assessors were wholly without jurisdiction. The assessment roll was complete in itself, irrespective of the attempted assessment of the stockholders. The assessment has no authority and is void (*Davis v. Newkirk*, 5 *Den.*, 92; *Prosser v. Secor*, 5 *Barb.*, 607; and see 15 *Pick.*, 44). Property *not taxable* is beyond their jurisdiction (1 *Rev. Stat.*, 389, § 8). 2. The collector is also liable. The stock being taxed by itself specifically, he had evidence that the tax was illegal.

III. The remedy is not merely by *certiorari*. The as-

sessment was not a case of over-taxation, nor a mere irregularity, but wholly without jurisdiction (*Adams v. Litchfield*, 10 *Conn.*, 127; and see *Alexander v. Hoyt*, 7 *Wend.*, 89, 93; *Suydam v. Keys*, 13 *Johns.*, 444; 5 *Barb.*, 608; *Mygatt v. Washburn*, 15 *N. Y.*, 316).

James Emott, for the respondents.—I. An action does not lie against the city for money received.

II. Nor for the misfeasance of the assessors (21 *Barb.*, 267; 3 *Den.*, 117; 1 *Hill*, 545; 12 *Barb.*, 161; 11 *N. Y.* [1 *Kern.*], 392, 31 *Barb.*, 505).

III. The plaintiff, if wronged by the collector, has two sufficient legal remedies: 1. Trespass against him; and 2. *A certiorari*. Therefore, the court will not issue an injunction now (*Heywood v. City of Buffalo*, 14 *N. Y.*, 534).

IV. But the collector is not liable in trespass (*Savacool v. Boughton*, 5 *Wend.*, 170; *Chegaray v. Jenkins*, 5 *N. Y.* [1 *Seld.*], 376).

V. There is nothing on the face of the warrant to show want of jurisdiction. The assessors had jurisdiction (1 *Seld.*, 376; *Randall v. Smith*, 1 *Den.*, 214). The claim of exemption could not be raised against the warrant (*Patchin v. Ritter*, 27 *Barb.*, 34; *Hill v. Sellick*, 21 *Id.*, 207; *Johnson v. Dean*, 30 *Id.*, 616; *Ontario Bank v. Bunnell*, 10 *Wend.*, 186, 196).

VI. The assessors' action is judicial.

VII. They had jurisdiction of person and subject, and they are not liable personally, unless corruption is shown (*Weaver v. Diefendorf*, 3 *Den.*, 117; *Hill v. Sellick*, 21 *Barb.*, 207; *Chegaray v. Jenkins*, 5 *N. Y.* [1 *Seld.*], 376).

VIII. Finally, the assessors, we contend, had jurisdiction not only of taxable property, but of this particular species of property; and at most, their determination was erroneous, not void.

John Thompson, in reply, in addition to the foregoing authorities;—cited and commented on *Dow v. Parish of Sudbury*, 5 *Metc.*, 73; *Inglee v. Bosworth*, 5 *Pick.*, 501; *Baker v. Allen*, 21 *Id.*, 383; *Boston Glass Co. v. Boston*,

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4 *Metc.*, 181; Sumner v. Dorchester, 4 *Pick.*, 364; 21 *Pick.*, 64; Preston v. City of Boston, 12 *Pick.*, 7; 30 *Maine*, 404; Amesbury Manufg. Co. v. Town of Amesbury, 17 *Mass.*, 460; Salem Iron Co. v. Danvers, 10 *Mass.*, 514; Atwater v. Woodbridge, 6 *Conn.*, 223; 7 *Id.*, 333; 11 *Id.*, 257; 13 *Id.*, 228; Adams v. Littlefield, 10 *Id.*, 127.

PARKER, J.—These are controversies submitted to the supreme court, without action, pursuant to section 372 of the Code.

The facts stated to the court in the several submissions, which are substantially alike, show that the plaintiffs are residents of the city of Poughkeepsie, and respectively owners of shares in three national banks, organized under the act of Congress, approved June 3, 1864, and located in said city.

The assessors of that city, in the year 1865, assessed the plaintiffs, respectively, for their shares in the said banks, at their par value. The plaintiffs did not personally appear before the assessors, nor serve any claim or notice on them in reference to said assessment. The assessors made out an assessment roll in the form prescribed by statute, on which each of the plaintiffs were assessed and taxed for other property; and at the close of the alphabetical list, and on a separate part of the roll, they inserted the names of the said national banks, and the value of the real estate of each, and then, under the name of each bank so entered, they entered the names of the shareholders therein respectively, the numbers of the shares owned by each, and the par value thereof; and the common council imposed and extended the tax upon the real estate of each bank, and upon each shareholder for the value of his shares so entered.

The cashiers of the banks, before the completion of the roll, notified the assessors that such last-mentioned assessments were illegal, and demanded that they should be stricken from the roll. This was refused by the direction of the common council; a warrant was issued to the collector, under the seal of the city and the hand of the mayor,

attached to the assessment roll, and with it delivered to the collector, commanding him to receive, levy, and collect from the several persons therein named the several taxes therein imposed.

Under this warrant, the collector, on the 7th of June, 1866, levied and collected the several taxes imposed on such bank shares of the plaintiffs respectively, for their goods and chattels, and did forthwith pay the same to the chamberlain of said city, who is *ex-officio* treasurer thereof.

On the part of the plaintiffs it is claimed that the said assessments, and all proceedings based thereon, were without jurisdiction and void ; and that the levy on their goods and chattels, in pursuance of said warrant, and by direction of said city, was a trespass, for which the defendants respectively are liable to the plaintiffs, in the amount so collected from them.

On the other hand, the defendants claim that the assessors had jurisdiction in the premises, and admitted that the bank shares were exempt from taxation ; that the defendants, respectively, are not liable to any action by reason of said assessments, &c., but that the plaintiffs, having omitted to institute legal proceedings to compel the collection of said assessment roll, by the court or otherwise, are remediless in the premises.

The supreme court held that the plaintiffs were neither of them entitled to recover, and gave judgment for the defendants respectively to that effect, and for costs.

From the judgment thus given the plaintiffs severally appeal to this court.

The question in each case is, did the assessors have *jurisdiction* in respect to the assessments complained of? for it is not denied, on the one hand, that, under the decision of the supreme court of the United States, in *Van Allen v. The Assessors* (3 *Wall.*, 573), the assessment was unauthorized, and would have been set aside upon due application to the supreme court, as not being in accordance with law ; nor, on the other, that if the assessors had jurisdiction in the matter, and have erred only in its exercise, the only remedy of the plaintiffs was such application

to set it aside; and that no action for the irregularity would lie against any of the defendants; except that in the case of *Swift v. City of Poughkeepsie*, it is claimed by the plaintiff that, even if the assessors had jurisdiction, so that they and the collector are not liable, still as the plaintiff was not legally liable to taxation on his bank shares, the city, which has received the money collected from him to satisfy such illegal tax, is legally liable to refund it to him.

That the assessors had jurisdiction in the matter cannot, I think, be successfully disputed.

Taxation of all property is the general rule of the statute. It provides as follows: "All lands, and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified" (1 *Rev. Stat.*, 387, § 1, 1st ed.). By the same statute (p. 390, § 8), it is made the duty of the assessors "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their towns or wards, and also all the taxable property, real or personal, within the same." It is not denied that the assessors had jurisdiction of the plaintiffs, as taxable inhabitants of their towns or wards. As to the property in question, it falls within the description of property declared by section 1 of the act above quoted to be liable to taxation. It is "personal estate," as the same is defined by section 3 of the act, the term including "public stocks," and "stocks in moneyed corporations." It may also fall within one of the exemptions; but being property *prima facie* liable to taxation, and the duty of the assessors being to ascertain all the taxable property, real and personal, within their town or ward, this property, held by residents of their town, presents itself to them for their decision whether it is taxable or exempt from taxation. That it shall turn out to be exempt from taxation does not exempt it from the scrutiny required of them by the statute, to ascertain whether or not it is taxable. Being personal property within their town or ward, it is within their jurisdiction as assessors; they have the right, and it is their duty, to ex-

amine the question whether it is liable to taxation, and this is a judicial inquiry (11 *N. Y.* [1 *Kern.*], 593 ; 3 *Den.*, 117)—one, it may be remarked, in which the highest courts have differed ; and should they make a mistake, and hold it liable to taxation when it is not, surely they should not, for such mistake, be held liable as wrong-doers (*Chegaray v. Jenkins* (5 *N. Y.* [1 *Seld.*], 376 ; *Barhyte v. Shepherd*, 35 *N. Y.*, 238 ; *Vail v. Owen*, 19 *Barb.*, 22 ; *Rochester White Lead Co. v. City of Rochester*, 3 *N. Y.* [3 *Comst.*], 463).

One of the classes of property expressly exempted by section 4 of the act from taxation is, "Every building erected for the use of a college, incorporated academy, or other seminary of learning." In *Chegaray v. Jenkins* (*supra*), the building occupied by the plaintiff as a young ladies' boarding and day school, was taxed, she claiming that it was exempt ; and the collector levied on her property to collect the tax. Judge RUGGLES, in his opinion, discussing the question of jurisdiction, says : "The assessors, in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially, and within the sphere of their duty. . . . Having the general authority to make assessments for taxation within the ward in which the plaintiff's property was situated, they had jurisdiction of the subject-matter of the assessment in question." See also *Henderson v. Brown* (1 *Cai.*, 92). Section 4 of the act in effect allows ministers of the gospel to hold property to the amount of \$1,500 exempt from taxation. In *Barhyte v. Shepherd* (35 *N. Y.*, 238), the plaintiff, a minister of the gospel, sued the assessors for refusing to exempt him from taxation, although his real and personal estate were worth less than \$1,500 ; and it was held that the assessors had jurisdiction to decide whether the plaintiff's property was exempt or not ; and in so deciding acted judicially, and were not liable for assessing the plaintiff upon his property, even though it was exempt from taxation.

It cannot be said that the bank shares in these cases were any more absolutely exempt from taxation than "a

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building erected for the use of a seminary of learning," or the farm of a minister of the gospel, occupied by him, and of a value not exceeding \$1,500. If the building on the farm turns out to be exempt, because found to be in the category of exemptions, it is as absolutely non-taxable as the bank shares in question; and yet the assessors are not liable for improperly including it in the assessment, because they are invested by the statute with the authority to decide what property is taxable, and in so deciding act judicially.

It can make no difference, I apprehend, in regard to the assessors' jurisdiction, whether this immunity from taxation arises from State law or national law. In either case, the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it.

It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously.

It is impossible to make any distinction, in respect to the subject under consideration, between the case at bar and the cases last cited; and, as was said by Judge LEONARD in *Barhyte v. Shepherd*, after remarking upon the holding in *Mygatt v. Washburn* (15 N. Y., 316), that assessors have no jurisdiction to assess a non-resident for personal property: "It is not necessary to extend the application of the rule on any ground of public policy, that I can perceive, so as to include cases of mistake in deciding a claim to exemption, where the person and estate of the party are within the jurisdiction of the assessor."

The circumstance that the assessment of the bank shares was separate from the other personal property of the plaintiffs, and specifically upon the shares, does not affect the question of jurisdiction. If the assessors, having jurisdiction of the subject-matter, and of the persons of the plaintiffs, have failed to follow the directions of the statute in making up their roll, their action was irregular, and open to correction upon proper application to the su-

preme court; voidable, but not void (*Easton v. Calendar*, 11 *Wend.*, 91, 95; *Cunningham v. Bucklin*, 8 *Cow.*, 178; *Wilson v. Mayor, &c. of N. Y.*, 1 *Den.*, 595, 599; *Butler v. Potter*, 17 *Johns.*, 145; and cases above cited). The rule is stated in *Easton v. Calendar* as follows: "Where the magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by *certiorari* or writ of error."

In regard to the liability of the city of Poughkeepsie to refund the taxes paid into its treasury, and under the assessments in question, I am unable to see how it can be. The assessment was not void, but irregular or erroneous; and the only mode of avoiding such an assessment is by an application to the assessors, or by a proceeding in the supreme court to correct the errors or irregularities while the assessment stands unreversed; it is as effectual to protect not only those by whom it was made and executed, but all persons claiming under it, as a judgment of a court having jurisdiction. It would be an error to hold that no liability attached to those who instituted and carried out the proceedings to compel the payment of the money by the plaintiffs (there being no statutory protection), and yet that the individual or corporation who received it is legally liable to refund it.

The cases cited by the learned counsel for the appellants, holding that "when a tax has been *illegally* assessed and collected, the money may be recovered back," are cases where there was, in the view of the court, a want of jurisdiction. In *Osborn v. Danvers* (6 *Pick.*, 89), it was held that when a taxable inhabitant is overrated by assessors, whether by including in the valuation property of which he is not the owner, or that *for which he is not liable to be taxed*, that does not render the assessment invalid or void, and his only remedy is by application to the assessors, or the court of sessions, which is authorized to relieve in such cases, and not by an action for money had and received.

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I am of the opinion that the judgment appealed from should be affirmed.

As to the case of *Foster v. Van Wyck*, and *Van Kleeck v. Woodruff*, all the judges concur in affirming the judgments.

As to the case of *Swift v. City of Poughkeepsie*, a sufficient number of judges to give a judgment failing to concur, a reargument in that case is ordered.*

Judgment affirmed in the first and second cases, and reargument ordered in the third case.

DAVIS *against* DUFFIE.

Court of Appeals; June Term, 1867.

SERVICE OF PROCESS.—CIVIL DEATH OF CONVICT.— CUMULATIVE REMEDIES.

Service of process upon a convict in the State prison is valid, and gives the court jurisdiction.

The suspension of civil rights which the statute (2 *Rev. Stat.*, 701, § 19) declares to be the effect of a sentence to State prison, does not give him any immunity from actions, nor suspend the rights of others.

The statute allowing such prisoners to be proceeded against as absent debtors, is not exclusive of the ordinary remedy by action.

Appeal from an order for a new trial.

This action was brought by Smith and Oliver Davis, in the superior court of the city of New York, against Cornelius R. Duffie and others, to redeem certain lots and

* That cause was finally determined in favor of the defendants also. The judgment of the court of appeals thereon is reported in 37 *N. Y.*, 511.

premises, situated in said city, from the effect and lien of a mortgage covering the same, made by the plaintiff, Smith Davis, to the defendant, Cornelius R. Duffie, dated March 8, 1838, which mortgage was given to secure the payment of \$100, and interest, within two years from its date.

The court at special term gave judgment for the plaintiffs,—holding that they were entitled to redeem the premises from the lien of the mortgage, and determining the rights of the parties defendant, who had acquired an interest therein. The decision is reported in 18 *Abb. Pr.*, 360.

On appeal the general term reversed the judgment, and ordered a new trial. The decision is reported in 8 *Bosw.*, 617. Thereupon the plaintiffs appealed to this court, stipulating that, in case the order should be affirmed, judgment absolute might be rendered against them.

Edmonds & Field, for the plaintiffs, appellants.—I. The service on Davis in prison was void (2 *Rev. Stat.*, 701, § 19; and see *Troup v. Wood*, 4 *Johns. Ch.*, 228; *O'Brien v. Hagan*, 1 *Duer*, 664; *Freeman v. Frank*, 10 *Abb. Pr.*, 370; *Miller v. Finkle*, 1 *Park. Cr.*, 374). The effect on a convict for a term of years is the same as on one for life. The only way for the mortgagee to proceed against the mortgagor was under the statute as against an absconding debtor (2 *Rev. Stat.*, 15, Art. II.).

II. The statute of limitations is no bar.

H. W. Robinson, and *Messrs. Owen and Mitchell*, for the respondents.—The service in prison was valid and regular (*Hoffm. Ch. Pr.*, 109; 1 *Dan. Ch. Pr.*, 64, 566; 1 *Barb. Ch. Pr.*, 50, 51; *Hind's Ch. Pr.*, 85; *Johnson v. Johnson*, *Walk. [Mic.] Ch.*, 309; *Phelps v. Phelps*, 7 *Paige*, 150; *Joyce v. Joyce*, 1 *Hogan*, 121). 1. The attainder did not affect the prisoner's liability (1 *Chitt. Cr. L.*, 725; 1 *Chitt. on Contr.*, 184; 1 *Chitt. Pl.*, 481; *Foster's Crown L.*, 61, 63; *Bannyster v. Trussett*, *Cro. Eliz.*, 516; *Hastings v. Blake*, 1 *Noy*, 1; 1 *Viner's Abr.*, "At-

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tainder," B, 3; Ramsey v. McDonald, 1 Wm. Blackst., 30; S. C., 1 Wils., 217; Dunham v. Drake, Coxe [N. J.], 315. *a.* He might still appear by attorney (2 Andr., 38, 42; Ramsey v. McDonald [*supra*]; Coppin v. Gunner, 2 Ld. Raym., 1572; Harvey v. Jacobs, 1 B. & Ald., 169; Barrett v. Power, 25 Eng. L. & Eq., 524; and see Saund. Ev., 733; Com. Dig., tit. "Capacity," D., 6; Doe v. Griffith, 5 B. & Adol., 765; Shep. Touchst., 232). *b.* He cannot take advantage of his own wrong (Dunham v. Drake, Coxe [N. J.], 315. *c.* He was a necessary party, because a reversal of his conviction would avoid the effect of judgments against him (Wambaugh v. Gates, 8 N. Y. [4 Seld.], 138; Miller v. Finkle, 1 Park. Cr., 377), unless an immediate sale has been made by the trustees (2 Rev. Stat., 375, § 68). 2. It was within the common law powers of the court to adopt a substituted service (Dunn v. Dunn, 4 Paige, 425).

II. The statute suspending his civil rights does not interfere with the power of the court to proceed *against* him. 1. It was merely declaratory (Rev. Notes, 3 Rev. Stat., 2nd ed., 835). It is *his* rights which are suspended (2 Petersd. Abr., 491, "Attainder;" Exp. Bullock, 14 Ves. Jr., 452; Bullock v. Dodd, 2 B. & Ald., 258; Roberts v. Walker, 1 Russ. & Mylne, 752; Stokes v. Holden, 1 Keen, 145; 2 Leach C. C., 966; Webst. Dict., "Civil;" 4 Blackst. Com., 373, 382. 2. He was not "civilly dead" (Platner v. Sherwood, 6 Johns. Ch., 120). 3. Nor had he forfeited his property (2 Rev. Stat., 701, § 22). 4. The statute does not in terms or by implication impose new disabilities, nor interfere with rights of action against him.

III. The statute (2 Rev. Stat., 15, § 1) for appointing trustees of imprisoned debtors, does not apply to this case. 1. It is merely for the preservation of the debtor's estate. 2. It is merely permissive, not prohibitory (Malcom v. Rogers, 5 Cow., 188; N. & C. Turnpike Co. v. Miller, 5 Johns. Ch., 101; Smith v. Lockwood, 13 Barb., 217). 3. It only furnishes a cumulative remedy, without taking away the common law remedies (Almy v. Harris, 5

Johns., 175; *Colden v. Eldred*, 15 *Id.*, 220; *Farmer's Turnpike Co. v. Coventry*, 10 *Id.*, 389). 4. It was originally a proceeding which only a creditor could originate (1 *Rev. L.*, 164, § 29). 5. He would be a necessary party, even if trustees had been appointed (1 *Dan. Ch. Pr.*, 256). 6. As mere mortgagee, the plaintiff was not a creditor (*Culver v. Sisson*, 3 *N. Y. [3 Comst.]*, 264; *Murray v. Smith*, 1 *Duer*, 412). 7. This statute extends to prisoners whose civil rights are not suspended. 8. The construction claimed would take away the common law remedy by action, and would be unconstitutional (*Wynhamer v. People*, 13 *N. Y. [3 Kern.]*, 387). 9. A creditor by mortgage, to become a petitioning creditor under it, must relinquish his security (2 *Rev. Stat.*, 36, § 11; *Id.*, 14).

BOCKES, J.—The record shows that on the 2nd day of September, 1839, the mortgagor, Smith Davis, was convicted of forgery in the second degree, and was sentenced to the State prison at Sing Sing, for seven years from that time, and that he was confined there during the period of his sentence.

That while he was there in confinement the mortgagee took proceedings to foreclose the mortgage in the court of chancery, before the vice-chancellor of the first circuit, and on the 10th September, 1840, obtained a decree of foreclosure and sale, under which decree a sale was had, and the defendant Duffie, the mortgagee, became the purchaser of the mortgaged premises. Davis was a party to the foreclosure suit. The subpoena issued therein was served on him while imprisoned in the State prison, under the aforesaid sentence, and also on the keeper of the prison. On these facts the question is presented, whether Davis, the mortgagor, was bound by the foreclosure, and his right of redemption thereby barred. It is insisted, on the part of the plaintiffs, that the service of process on him in prison, under sentence for felony, was unauthorized, illegal, and void; and this position is based on the statute, which declares that "a sentence of imprisonment in a State prison, for any term less than for life, suspends

all the civil rights of the person so sentenced, during the term of such imprisonment" (2 *Rev. Stat.*, 701, § 19).

It is plain, I think, that the convict can claim no immunity under this provision of the statute. Its purpose was not to give him rights or privileges which he would not have if free, or unaffected by a conviction and sentence for a criminal offense. Its language is, that the sentence "suspends all the civil rights of the person so sentenced"—not the rights of others against him.

I concur unreservedly in the remarks of Judge Bosworth, where he says that "Duffie's mortgage lien was not impaired by Davis's guilt or conviction; his right to foreclose remained unaffected;" and further, that if Duffie could not procure a regular, valid decree while Davis was in prison, that it will follow that his conviction and sentence not only suspended his civil rights, but the rights of others against him.

This result was neither effected or intended by the statute. It was decided in *Phelps v. Phelps* (7 *Paige*, 150) that service upon a convict in the State prison, as in this case, was regular and valid to confer jurisdiction; and this has been the settled rule of law and practice both in England and in this country for a long period of time (2 *Madd. Ch. Pr.*, 200; 1 *Hoffm. Ch. Pr.*, 109; 1 *Barb. Ch. Pr.*, 50, 51). Even if Davis could be deemed civilly dead, as would have been his condition had he been sentenced to imprisonment for life (2 *Rev. Stat.*, 701, § 20), still he would have been answerable to his creditors, according to the usual practice of the courts. CHITTY says: "This situation of *civilitur mortuus* is never allowed to protect him from the claims of private individuals or the necessities of public justice; so that, although he can bring no action against another, he may be sued, and execution may be taken out against him." See also remarks of Chancellor KENT in *Platner v. Sherwood* (6 *Johns. Ch.*, 130, 131). Indeed, the decisions are uniform, that although the right of a convict to prosecute an action is suspended, and his property in some instances forfeited,

Sutton v. De Camp.

still he may be sued, and the suit against him may be prosecuted to judgment.

Nor is this right taken from a creditor by the provision of the statute declaring that persons imprisoned in the State prison, other than persons adjudged to imprisonment for life, shall be deemed absconding debtors, within the purview of the act providing for relief against absconding and absent debtors. This act was intended to enlarge the rights of creditors, not to limit or restrict them, in regard to persons under confinement as criminals. This subject is fully considered by Mr. Justice BOSWORTH in his opinion on the appeal in the court below, and with his reasoning and conclusion on this, as well as on all the other questions in the case, we entirely concur.

The order appealed from must be affirmed, with costs, and judgment absolute against the plaintiffs rendered, pursuant to the stipulation served with the notice of appeal.

All concurred in the result.

Order affirmed.

SUTTON *against* DE CAMP.

New York Common Pleas, Special Term; March, 1833.

ARREST.—FIDUCIARY CAPACITY.

Commission merchants who sell goods for consignors on an agreement to guarantee the payment of the price on such sales, for a commission, do not receive the price in a fiduciary capacity, within the meaning of the provisions of the Code of Procedure; and are not liable to arrest in an action by the consignor to recover the sums so guaranteed by them.*

* Compare *Clark v. Pinckney*, 50 *Barb.*, 226; *Duguid v. Edwards*, *Id.*, 288.

Motion to vacate an order of arrest.

The defendants were commission merchants and auctioneers, and the plaintiffs consigned to them dry goods to be sold by them at public auction, the defendants' commissions being five per cent. on the gross sale, to wit: two and one-half per cent. for the sale, two per cent. for a guaranty, and one-half per cent. cost for cataloguing the goods.

The defendants were to have ten days to account to their consignors.

The defendants gave various credits to the purchasers of the goods, and before these credits expired they were compelled to suspend, and the credits passed to their assignee in bankruptcy as a part of their assets. The defendants swore that they had not received any part of the proceeds of the sale of the plaintiff's goods.

BRADY, J.—The defendants were auctioneers, but received a commission to guarantee the sales made by them. Some of the sales were on a short credit and the amounts due have not been collected. When a guarantee is given as in this case, the auctioneer becomes the surety, and his fiduciary character does not exist, if at all, until the receipt of the moneys which he has obligated himself to pay.

The word "fiduciary," as applied under the Code, embraces trusts reposed, relations which involve the receipt and payment of money belonging to another over to him, not the receipt of money upon a transaction where the recipient has bound himself to pay the debt, whether it be received by him or not. In this case, the defendants were engaged to sell, and were paid a commission to guarantee the payment of the sums to be paid on such sales as might be made. This arrangement authorized the defendants to mingle the money paid with their own, and they became general debtors to the plaintiffs.

I think the order of arrest must be discharged.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume:

Viz.—37 NEW YORK; 49 and 50 BARBOUR; 4 ABBOTTS' PR. N. S.; 35 HOWARDS' PR.; 4 ROBERTSON; and in LAWS OF 1868.

ABATEMENT.

Where, after decree in partition, one of the heirs died leaving a will devising her interest to her executor in trust, with a life estate, and the remainder to the use of her heirs,—*Held*, that it was proper to file a bill of revivor to bring in as defendants in the partition the trustee and the heirs of the deceased. *Ct. of Appeals*, 1867, *Clemens v. Clemens*, 37 N. Y., 59.

ANSWER, 1.

ACCOUNTING (ACTION FOR).

An equitable action will not lie by the owner of securities pledged, against the pledgee, to redeem the same upon the settlement of the accounts between the parties, and for an injunction against a sale of the securities by the defendants, unless the account on which the plaintiff relies for the equitable jurisdiction of the court is something more than one item on one side, and a number of set-offs on the other; and the court, in deciding whether such an account is really involved in the case, will examine the claims made in the complaint, and reject such as are clearly unsupported or inconsistent with the frame of the complaint. *N. Y. Superior Ct.*, 1868, *Durant v. Einstein*, 35 *How. Pr.*, 223, 240.

ACTION.

ACKNOWLEDGMENT OF DEEDS.

ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.

ACTION.

1. The statute allowing prisoners in State prisons to be proceeded against as absent debtors is not exclusive of the ordinary remedy by action. *Ct. of Appeals*, 1867, *Davis v. Duffie*, *Ante*, 478.
2. The statute authorizing the commissioners of the land-office to remove, by a summary proceeding, the occupants of land, on a sale thereof by the commissioners, is not exclusive, and does not preclude an action for the recovery of possession. There is nothing in the statute making the remedy provided exclusive; and when the common law gives a remedy, and another remedy is provided by the statute, the latter is cumulative, unless made exclusive by the statute. [14 Wend., 202, and cases cited.] *Ct. of Appeals*, 1868, *Candee v. Hayward*, 37 *N. Y.*, 653.
3. An action does not lie against a town to recover a claim arising upon a contract. The remedy is to procure payment through the board of supervisors, and by mandamus if they refuse to act. *Supreme Ct.*, 1867, *Bell v. Town of Esopus*, 49 *Barb.*, 506.
4. Neither the authority given by the legislature to a municipal corporation to raise a specified sum to pay the amount due to individual creditors, nor their actual collection of that sum by taxation, can convert them into private trustees or agents of such creditors, and make them liable for money had and received; since they collect and disburse it as public agents. Whatever remedy the creditors may have to obtain such sum, under such a statute and collection, by mandamus, or other process, it is not by an action. *N. Y. Superior Ct.*, 1867, *Berrian v. Mayor, &c. of N. Y.*, 4 *Rob.*, 538.
5. It is a sound principle that the action for use and occupation is founded upon contract, and lies only when the relation of landlord and tenant exists. *N. Y. Superior Ct.*, 1868, *Coit v. Planer*, *Ante*, 140.
6. But a contract, in order to sustain the action, need not be express; it may be implied from circumstances,—*e. g.*, from the facts that the plaintiff notified the defendant he would charge a certain rent for the premises, and the defendant, under such notice, entered upon, and used them. *Ib.*
7. A party to an absolutely void marriage which was procured by the fraud of the other party, may maintain an action for damages therefor without first procuring a formal annulment of the contract. *Ct. of Appeals*, 1868, *Blossom v. Barrett*, 37 *N. Y.*, 434.
8. The mother of a minor child, whose father is deceased, she being bound to support it, and entitled to its services, may maintain an action for se-

ATTORNEY AND CLIENT.

- duction. [Reviewing many authorities.] *Supreme Ct.*, 1867, *Gray v. Durland*, 50 *Barb.*, 100.
9. A stockholder in a corporation may bring an action against trustees thereof who have audited and directed payment of a bill to one of their own number, at a meeting at which such one being present was necessary to make up a quorum. A trustee is disqualified from acting where the board are dealing with himself, and in such case, without another member present, the trustees acting had no authority to transact business. *Ct. of Appeals*, 1867, *Butts v. Wood*, 37 *N. Y.*, 317.
 10. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose of dissolving or restraining another association or company, of which the nominal plaintiff may be a member. [7 *Jur. N. S.*, 5 *Id.*, 612.] *Supreme Ct. Sp. T.*, 1867, *Waterbury v. Merchant's Union Express Co.*, 50 *Barb.*, 157.
 11. The proper remedy to recover scrip or stock in a corporation which was issued in the name of the defendant while he was agent for the plaintiff, is not an action for the recovery of specific possession of personal property. His remedy is in equity, or perhaps an action for damages. *Supreme Ct.*, 1867, *Wheeler v. Allen*, 49 *Barb.*, 460.
 12. An action lies to have dower admeasured, and for the recovery of possession thereof, and the payments of rents and profits. There is no longer any reason for severing the equitable relief from the recovery of the possession; and if there were, it would be an objection, not to the jurisdiction, but of misjoinder of these causes of action. *N. Y. Superior Ct.*, 1866, *Brown v. Brown*, 4 *Rob.*, 688.

ACCOUNTING; ASSOCIATIONS; CAUSE OF ACTION; INJUNCTION.

ADJOURNMENT.

A court of oyer and terminer held in a county where there is more than one place designated by law for holding circuit or county courts, may adjourn from one such place to the other. *Supreme Ct.*, 1867, *People v. Northrup*, 50 *Barb.*, 147.

ATTORNEY AND CLIENT.

1. Where an attorney prosecuted an action of ejectment, in the name of the grantors and grantee in a deed purporting to convey lands, against a defendant who was in adverse possession thereof when the deed was made, and the recovery was defeated,—*Held*, that the grantors were liable to the defendant in such ejectment for the costs of the action, notwithstanding such prosecution was without their knowledge, and at the instance of the grantee. *Ct. of Appeals*, 1868, *Hamilton v. Wright*, 37 *N. Y.*, 502.
2. What is reasonable compensation for services of the attorney of a corpo-

AMENDMENT.

ration in taking charge of lands bought under foreclosure, and frequent consultations. *Farmers' Loan & Trust Co. v. Mann*, 4 *Rob.*, 356.

ATTORNEY-GENERAL.

Attorney-general authorized to bring suit against certain contractors. 2 *Laws of 1868*, 2074.

AMENDMENT.

1. In an action of a legal nature, to recover upon a contract, the plaintiff cannot, at the trial, have leave to amend his complaint so as to ask a reformation of a written agreement upon parol evidence such as is not admissible to vary the contract, as a matter of evidence in the action as first framed. *Supreme Ct.*, 1867, *Bush v. Tilley*, 49 *Barb.*, 599.
2. A complaint cannot be amended *upon the trial*, by a referee or by the court, by adding another cause of action not set up in the original complaint. An amendment of this sort may be made upon motion before trial, but not upon the trial. It is not to be regarded as the insertion of "other allegations material to the case," within the meaning of section 173 of the Code of Procedure, allowing amendments. The fair construction and meaning of that phrase is, that where a cause of action is improperly set forth in the complaint, or defense in the answer, or a pleading is defective for any reason, the court may, in its discretion, at any stage of the case, authorize such imperfection or defect to be remedied by amendment, by inserting allegations necessary to make the case as intended by the original pleadings; but not to insert a new and distinct cause of action or defense. *Supreme Ct. Sp. T.*, 1868, *Ford v. Ford*, 35 *How. Pr.*, 321.
3. A complaint for unlawfully and wrongfully taking and converting plaintiff's property, may be amended at the trial, by adding that the property was taken willfully and maliciously, where defendant does not make oath to being misled or prejudiced. This is not a new cause of action. *Supreme Ct.*, 1867, *Wilde v. Hexter*, 50 *Barb.*, 448.
4. The court of appeals will not allow an amendment of the complaint changing the cause of action,—*e. g.*, changing an action to recover fees of an office claimed by plaintiff, but exercised wrongfully by defendant, into an action for money had and received. *Ct. of Appeals*, 1868, *Smith v. Mayor, &c.*, 37 *N. Y.*, 518.
5. In an action for damages for breach of a covenant to pay an assessment, an amendment is not to be allowed in the appellate court to sustain a demand for *equitable relief* requiring the defendant to pay the assessment. *N. Y. Superior Ct.*, 1866, *Rector, &c. of Trinity Church v. Higgins*, 4 *Rob.*, 1; 1867, *Id.*, 372.
6. The refusal of the court, on the trial of an action for assault and battery, to allow the answer to be amended, so as to show a recovery had at the same circuit by the defendant against the plaintiff for a battery committed

ANSWER.

- in the same struggle and transaction (the defendant giving proof that he was surprised),—*Held*, ground for ordering a new trial. *Supreme Ct.*, 1867, *Bailey v. Kay*, 50 *Barb.*, 110.
7. Where the plaintiff sues on demands assigned to him, which are in fact but a part of a running account between the assignor and the defendants, the whole account should be examined upon the trial; and if the equities were not set up in the answer, the defect may be cured by amendment. *Supreme Ct.*, 1868, *Read v. Jaudon*, 35 *How. Pr.*, 303.
 8. A judgment of foreclosure and report of sale are "proceedings," amendable *nunc pro tunc*, under section 173 of the Code. *Ct. of Appeals*, 1867, *Hogan v. Hoyt*, 37 *N. Y.*, 300.
 9. Where the minutes of the clerk showed that the exceptions taken on the trial were directed to be first heard at a general term, and the case stated that the verdict was taken subject to the opinion of the court at a general term,—*Held*, that the record should be amended, to conform to the minutes. *N. Y. Superior Ct.*, 1867, *Johnson v. Mulry*, 4 *Rob.*, 401.
 10. The court at special term has not power to allow an amendment of a notice of appeal, the effect of which is not merely to correct a mistake, but to enlarge the time allowed by the Code for taking the appeal. *N. Y. Superior Ct.*, 1867, *Bryant v. Bryant*, *Ante*, 138.
 11. Where a party having leave to amend, declines to do so, and appeals from the order against him, his right to amend is waived, and the court of appeals will not renew or revive it. *Ct. of Appeals*, 1868, *Shibley v. Angle*, 37 *N. Y.*, 626.

ANSWER.

1. Where a defendant, sued in the New York superior court, sets up in his answer (it not appearing by the complaint), that he is a resident of another State, and that the summons was served upon him in such other State only, and protests against the jurisdiction of the court, and no other defense relating to the merits is set up in the answer, this amounts, if not denied, to good ground for an abatement of the suit or a dismissal of the complaint. The appearance in such a case does not amount to submitting to the jurisdiction of the court. *N. Y. Superior Ct.*, 1865, *Sullivan v. Frazee*, 4 *Rob.*, 616.
2. An answer to a complaint on a promissory note, which sets up as a defense that the note was made as a memorandum note, and was not to be negotiated, is frivolous. *N. Y. Superior Ct. Sp. T.*, 1867, *Plant v. Schuyler*, *Ante*, 146.
3. A denial, in an answer to a complaint upon a promissory note, that the plaintiff is a *bona fide* holder of the note, or that he received the same in course of business, or that he advanced any new consideration therefor, is insufficient. *Ib.*
4. An answer, in an action upon an award of arbitrators, which avers that the arbitrators, in computing the amount to be awarded, made a clerical error

APPEAL.

in the computation, and that the award was the result of such clerical error, is sufficient upon demurrer, although it does not show what the nature of the mistake was. *N. Y. Superior Ct. Sp. T.*, 1868, *Garvey v. Carey*, *Ante*, 159.

5. A statement in an answer of a demand against plaintiff, which contains no expressions importing that the defendant claims to recover upon it against the plaintiff, does not constitute a counter-claim, but should be treated as a defense, merely. *Ct. of Appeals*, 1867, *Bates v. Rosekrans*, *Ante*, 276; *S. C.*, 37 *N. Y.*, 409.
6. A peculiar answer in an action by a trustee to settle his accounts and be discharged from the trust, examined, and—*Held*, not to contain irrelevant matter. *McGregor v. McGregor*, 35 *How. Pr.*, 385.

COUNTER-CLAIM; DEFENSES; PLEADING.

APPEARANCE.

The mere subscription of an answer with the name of an attorney, is not such an appearance as to waive any objection to jurisdiction, where the answer objects to the jurisdiction. *N. Y. Superior Ct.*, 1865, *Sullivan v. Frazee*, 4 *Rob.*, 616.

APPEAL, 7; SERVICE (AND PROOF OF).

APPEAL.

1. The usual decree for a sale, in an action to foreclose a mortgage, directing the premises to be sold by the sheriff, and a judgment for any deficiency that may arise to be docketed by the clerk, is, before those proceedings are had, a "final judgment," within the provisions of the Code as to appeals. *Ct. of Appeals*, 1808, *Morange v. Morris*, *Ante*, 447.
2. A judgment is to be regarded as interlocutory, only when it reserves something for the court judicially to determine. *Ib.*
3. An order settling issues in a cause of equitable character to be tried by a jury, is not appealable. *Supreme Ct.*, 1864, *Wood v. Mayor, &c. of N. Y.*, *Ante*, 153.
4. An order of the general term, affirming an order of the special term allowing and adjusting costs, is not appealable to the court of appeals. *Ct. of Appeals*, 1867, *McClure v. Supervisors of Niagara County*, *Ante*, 202.
5. Plaintiff having obtained an order striking out defendant's answer as sham, procured the order to be entered with the direction that judgment should be entered for the plaintiff.—*Held*, that an appeal would not lie from such judgment. It was a judgment by default as upon a failure to answer; and no order for judgment was proper. The defendant's proper practice would be to appeal from the order striking out the answer. *N. Y. Superior Ct.*, 1865, *Potter v. Carreras*, 4 *Rob.*, 629.
6. An order denying a motion that a receiver pay costs to which a party defending an action prosecuted by such receiver has become entitled, is not

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- discretionary in such sense that it cannot be reviewed in the court of appeals. *Ct. of Appeals*, 1868, *Columbian Ins. Co. v. Stevens*, *Ante*, 122; *S. C.*, 37 *N. Y.*, 536.
7. That a general appearance upon an appeal and noticing it for argument, is a waiver of the right to have the appeal dismissed as being too late. *Supreme Ct.*, 1866, *Pearson v. Lovejoy*, 35 *How. Pr.*, 193.
 8. Upon an appeal in proceedings of mandamus relative to the laying out of a highway, the court of appeals will not review the construction put by the court below upon the order for laying out the highway, in respect to whether it was made upon an application for one or for two separate roads. Such a question is to be regarded as rather a question of fact than of law. *Ct. of Appeals*, 1867, *People v. Commissioners, &c.*, 37 *N. Y.*, 360.
 9. The lack of proof of a demand before suit, if not objected to at the trial cannot be raised on appeal. *N. Y. Superior Ct.*, 1868, *Schafer v. Guest*, 35 *How. Pr.*, 184.
 10. Where a motion has been made, at a special term, for a new trial on a case, the court, on appeal, can look into the whole case, for the purpose of correcting any errors. *N. Y. Superior Ct.*, 1866, *Gaffney v. Chapman*, 4 *Rob.*, 275.
 11. Application for leave to amend at the trial being denied is not the subject of review on appeal. *Supreme Ct.*, 1866, *Dennis v. Snell*, 50 *Barb.*, 95.
 12. Upon an appeal from a judgment, it is competent to raise the objection that the court had no jurisdiction of the cause or subject-matter of the action. [3 *Comst.*, 9, 137.] *Supreme Ct.*, 1867, *Jones v. Norwich & N. Y. Transportation Co.*, 50 *Barb.*, 193.
 13. The supreme court in reviewing judgments rendered by referees and single judges, acts simply as a court of appeals, and can draw no original inferences from the evidence. The facts found must be sufficient to support the judgment; and if they are not sufficient, the court cannot supply the deficiency by drawing such conclusions from the evidence as it may think the referee was authorized to draw and should have drawn. But in construing and reviewing the reports of judges and referees, the whole report should be taken together; and if all parts of it, thus considered and construed, do cover the case and show that it was in fact decided upon correct principles, courts of review ought to sustain the judgment. *Supreme Ct.*, 1867, *Voorhis v. Voorhis*, 50 *Barb.*, 119.
 14. A judgment entered upon the report of a referee on a ground not presented in the pleadings or proceedings, nor taken on the trial, cannot be maintained on that ground, unless it is clear upon the evidence that the plaintiffs could recover upon a new trial. In general, if the plaintiffs seek to recover on such new ground, they should amend their complaint, or at least disclose their intention before the trial closes. *Supreme Ct.*, 1865, *Commercial Bank of Albany v. Ten Eyck*, 50 *Barb.*, 9.
 15. Although the court on appeal at general term cannot properly interfere

APPEAL.

- with any decision at special term, founded on conflicting evidence, it yet may do so where that on one side is mere information and belief, and that on the other positive knowledge. *N. Y. Superior Ct.*, 1867, *Durant v. Einstein*, 35 *How. Pr.*, 223.
16. The rule that the report of a referee, like the verdict of a jury, in a case of conflicting evidence, is conclusive as to questions of fact [7 *Bosw.*, 394; 3 *Comst.*, 168], is applicable to the findings of a judge. He takes the testimony, sees and hears the witnesses, and is quite as well able as a jury or referee to come to a correct conclusion upon the facts. *N. Y. Superior Ct.*, 1867, *Ritter v. Cushman*, 35 *How. Pr.*, 284.
 17. On appeal, a judgment based on a finding of express agreement should not be reversed merely because the agreement was not express, but only implied. *Supreme Ct.*, 1867, *Smith v. Lippincott*, 49 *Barb.*, 398. Compare *Sharp v. Simons*, *Id.*, 406.
 18. Where an erroneous charge is made by the judge, if it is possible that the defendant was injured by this error, the verdict must be set aside. It is not for the defendant to show how or to what extent he was prejudiced. The existence of the error establishes his claim to relief. If the plaintiffs wish to sustain the verdict, it is for them to show that the error did not and could not have affected it. [31 *Me.*, 528, 534; 12 *Pick.*, 177; 9 *Cow.*, 674; 21 *Wend.*, 354; 3 *Hill*, 194.] *Ct. of Appeals*, 1867, *Greene v. White*, 37 *N. Y.*, 405.
 19. When the order of the supreme court reversing a judgment fails to show that the judgment was reversed upon questions of fact, it must be assumed to have been upon questions of law, arising upon exceptions taken at the trial. *Ct. of Appeals*, 1868, *Baldwin v. Van Deusen*, 37 *N. Y.*, 487.
 20. Where a decree in foreclosure directed a sale by a referee, and it was made by the sheriff, and the court subsequently confirmed the sale,—*Held*, that the mode of sale was within the discretion of the court, and the mortgagor having acquiesced in the sale, could not, as against a purchaser in good faith, have the order of confirmation reversed on appeal. *Ct. of Appeals*, 1867, *Hogan v. Hoyt*, 37 *N. Y.*, 330.
 21. On appeal the court will assume that the circumstances properly bearing on the question of negligence were submitted to the jury as a question of fact, and were duly considered by them. *Supreme Ct.*, 1867, *Kenny v. First National Bank of Albany*, 50 *Barb.*, 112.
 22. If the plaintiff's claim rests wholly on a written instrument, which cannot be varied by parol evidence, and might have been disposed of on demurrer, or motion to dismiss the complaint where leave to amend might be refused, the judgment of reversal should be absolute without the award of a new trial. [Code, § 330; 16 *N. Y.*, 543.] *N. Y. Superior Ct.*, 1866, *Newell v. Wheeler*, 4 *Rob.*, 247.
 23. Applications for re-argument are to be discouraged. *N. Y. Superior Ct.*, 1867, *Rector, &c. of Trinity Church v. Higgins*, 4 *Rob.*, 372.

CASE; COURT OF APPEALS; HIGHWAYS; JUSTICES' COURTS, tit. *Appeal*.

ARREST.

ARREST.

1. The act of 1831 for the arrest of fraudulent debtors, commonly known as the Stilwell Act, is not repealed by the Code of Procedure. *Supreme Ct.*, 1868, *People v. Goodwin*, 50 *Barb.*, 562.
2. Under the provisions of the Code of Procedure relative to arrest, factors, agents and brokers, when acting in their capacities as such, are acting in fiduciary capacities, and the statute has accordingly provided for their arrest, as well as for the arrest of all other persons who may misappropriate moneys received by them in the course of their fiduciary relations. [Code, § 179, subd. 2; 17 *How. Pr.*, 420.] *Supreme Ct.*, 1867, *Duguid v. Edwards*, 50 *Barb.*, 288.
3. One employed as broker and agent for the purchase of coin and stocks, and receiving a deposit of money as security against loss on such transactions, is liable to an arrest in an action for the balance of account as for money received in a fiduciary capacity. *Supreme Ct.*, 1867, *Clark v. Pinckney*, 50 *Barb.*, 226.
4. Where the plaintiff alleged such a case in his complaint and affidavit, and the defendant moved to vacate the order upon his own affidavits, alleging that the relation of the parties was that of banker and depositor, and that credit was given to the banker, and interest paid to the depositor,—*Held*, that it was incumbent upon the defendant to make out a preponderance of proof in his own favor, and that an account showing interest credited to the defendant, was not, in this case, sufficient. *Ib.*
5. Commission merchants who sell goods for consignors on an agreement to guarantee the payment of the price on such sales, for a commission, do not receive the price in a fiduciary capacity, within the meaning of the provisions of the Code of Procedure; and are not liable to arrest in an action by the consignor to recover the sums so guaranteed by them. *N. Y. Com. Pl. Sp. T.*, 1868, *Sutton v. De Camp*, *Ante*, 483.
6. A principal who participates in the act of concealment of property, wrongfully obtained by his agent, liable to arrest in an action for the recovery thereof. *Tracy v. Veeder*, 35 *How. Pr.*, 209.
7. An action for a false representation concerning the credit of a third person, by which plaintiff was induced to part with his property to such person, is an action for fraud or deceit, within the meaning of subd. 4 of section 179 of the Code of Procedure, as amended in 1863; and an arrest may be ordered in such a case, without any allegation or proof that the defendant is a non-resident or intends to leave the State. *N. Y. Superior Ct. Sp. T.*, 1865, *Hazlett v. Gill*, 4 *Rob.*, 627.
8. In an action for the recovery of specific personal property, wrongfully detained, the plaintiff may have an order of arrest, and the order should require the holding to bail in a specified sum. Section 187 of the Code of Procedure,—which prescribes the form of the undertaking of bail in such

ASSESSMENT.

- case—does not affect the form of the order of arrest. [Disapproving 9 Bosw., 636.] *Supreme Ct.*, 1868, *Tracy v. Griffin*, 50 *Barb.*, 70.
9. An order of arrest under the Code of Procedure is sufficient if its language conforms to that of section 183; and it is not necessary that it should indicate, where that is the case, that the action was one for the recovery of personal property. This might be convenient, and would be a proper practice, but the order of arrest is not defective for want of it. *Supreme Ct.*, 1867, *Tracy v. Veeder*, 35 *How. Pr.*, 209.
 10. Even if it were necessary that the order should indicate that subdivision 3 of section 179 was relied upon, the court would not unnecessarily construe the affidavits to make out that the charge was under that subdivision. *Ib.*
 11. It is no objection to the validity of the order of arrest that the sum in which defendant is required to be held to bail is a less sum than the plaintiff might, under the statute, have inserted; for, being for the advantage of the defendants, they cannot set it aside on this ground. *Ib.*
 12. In an affidavit to obtain an order of arrest for fraud in purchasing goods on credit, the general allegations as to the falsity of the defendant's representations must be accompanied by a detailed averment of such facts, within the knowledge of the person making the affidavit, as shall be sufficient to satisfy the judge before whom the application is made, that such representations were untrue. *N. Y. Superior Ct. Sp. T.*, 1865, *Smith v. Jones*, 5 *Rob.*, 655.
 13. When the facts constituting the cause of action, and authorizing the arrest, are the same, a motion to vacate an order of arrest will be denied, unless there is a very decided preponderance of evidence of the defendant upon the motion, or unless the facts show clearly the plaintiff has no cause of action. The questions brought before the court on the motion being issues in the cause, the jury alone, except in the instances mentioned, should pass upon them at the trial. [14 *How. Pr.*, 131; 47 *Barb.*, 629.] *Supreme Ct.*, 1867, *Merritt v. Hecksher*, 50 *Barb.*, 452.
 14. In general, an order of arrest cannot be made after judgment. *Ct. of Appeals*, 1867, *Mott v. Union Bank*, *Ante*, 270.
 15. But where after a judgment upon default, an order is made opening the default, and allowing the defendant to come in and defend, although it directs that the judgment shall stand as security, an order of arrest may be made. *Ib.*
 16. An application for a warrant of arrest for obtaining property upon false pretenses which stated in substance that the accused did designedly and by false pretenses obtain from him, deponent, one sulky of the value of thirty dollars,—*Held*, sufficient. *Supreme Ct.*, 1867, *Pratt v. Bogardus*, 49 *Barb.*, 89.

ASSESSMENT.

1. Tax assessors having jurisdiction of the person, and of the subject-matter—*i. e.*, taxation of property—and invested by the statute with authority

- to decide what property is taxable and what exempt, act judicially in so deciding; and an assessment, though clearly erroneous in overruling a claim of exemption, is not void. *Ct. of Appeals*, 1867, *Foster v. Van-Wyck*, *Ante*, 469.
2. It makes no difference whether the claim of exemption arises from State or national laws. *Ib.*
 3. It is for the commissioners of estimate and assessment to determine what is the area within which the property must be assessed for the enhanced value caused by a local improvement, and the court will not review their discretion in this respect. *Supreme Ct.*, 1867, *Matter of Church-street*, 49 *Barb.*, 455.
 4. Public parks may be assessed like other property. *Ib.*
 5. It has long since been settled, and has uniformly been acted upon by this court, that a mere error of judgment in the valuation of property taken was not the subject of review on a motion to confirm the report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed. *Supreme Ct.*, 1868, *Matter of Central Park*, 35 *How. Pr.*, 255.
 6. *It seems*, that the proper remedy of a person erroneously assessed is by a *certiorari*, which ought to bring up not only the naked question of jurisdiction but the evidence on which the body acted to which the writ is directed, as well as the ground or principle of their action, and thus present the entire case for review, and, if necessary, for correction. *Ct. of Appeals*, 1868, *Swift v. City of Poughkeepsie*, 37 *N. Y.*, 511.
 7. The provisions of the Act of 1858,—authorizing assessments to be set aside for fraud or legal irregularity,—are only intended to relieve against fraud or legal irregularity in the proceedings relative to an assessment or the proceedings to collect the same. The statute does not authorize any inquiry whether the work has been well done, or whether the contract has been fully performed, or whether the materials used are according to the specifications, or whether the common council had all the surveys and certificates of inspectors, as required by the ordinances. These matters belong to the common council as the law formerly and now is, the board of revision, and do not come within the provisions of this statute, except in cases where fraud is alleged to have been committed. *Supreme Ct.*, 1868, *Matter of Lewis*, 35 *How. Pr.*, 162.
 8. The fact that the assessment proposed is in violation of an alleged contract with lot owners by which the corporation are precluded from making such an assessment, is not an irregularity, within the meaning of the statute which authorizes these proceedings. *Ib.*
 9. The objection that the assessment was made by assessors other than those named in the ordinance is not available, where it was made by those who were assessors for the time being; for the ordinance should direct the assessment to be made by the board, and it is unnecessary to name them individually. *Ib.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

10. Various minor irregularities examined, and held insufficient to authorize vacating the assessment. *Ib.*
11. Section 3 of the "Act in relation to frauds in assessments for local improvements in the city of New York," passed Apr. 17, 1858, amended so as to read as follows: § 3. Any order vacating said assessments shall be entered in the office of the clerk of the supreme court, and on filing a certified copy thereof with the officer having charge of the assessment lists, it shall be the duty of said officer to cancel thereon the assessments so vacated, and all proceedings under the same; and the justice who shall have made such order may enforce the same, either by attachment for contempt, or by writ of mandamus, or both, against any party refusing to obey the same, with costs. 1 *Laws of 1868*, 404, ch. 193.

ASSIGNABILITY OF CAUSE OF ACTION.

1. A cause of action for wrongfully taking and converting ores is assignable, and may be sued on in the courts of this State, although it be alleged in the complaint that the ores were raised by the defendant from lands of plaintiff's assignor in another State. The allegation of ownership of the land may be regarded as merely an allegation of evidence to prove the ownership of the ore. *Supreme Ct.*, 1867, *Hoy v. Smith*, 49 *Barb.*, 360.
2. A cause of action for damages for a loss of property, sustained in consequence of the defendant's negligence in suffering a sunken canal-boat to impede the navigation of the canal and endanger the property of those navigating the canal, is assignable. [2 *Kern.*, 622.] *Ct. of Appeals*, 1868, *Fulton Fire Ins. Co. v. Baldwin*, 37 *N. Y.*, 648.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A surviving partner has power, as such, to make an assignment of assets of the firm for the benefit of creditors, and to give preferences in such assignment. *N. Y. Superior Ct.*, 1868, *Loeschigk v. Addison*, *Ante*, 210.
2. A provision in an assignment exonerating the assignee from liability to account for debts which he is unable to collect, does not vitiate the assignment; nor does a provision authorizing the assignee to appoint an attorney for matters connected with the trust, which he could not attend to personally. *Ct. of Appeals*, 1868, *Casey v. Janes*, 37 *N. Y.*, 608.
3. The mere omission of a debt from a schedule of creditors annexed to an assignment for the benefit of creditors, will not vitiate the assignment *per se*, especially where the debt is included in a general description. *N. Y. Superior Ct.*, 1866, *Mattison v. Demarest*, 4 *Rob.*, 161.
4. An assignment for benefit of creditors, executed by several partners, must be acknowledged by them all; and the officer taking the acknowledgment must have some distinct personal knowledge of them all, or must take sworn evidence of the identity of such as he does not know. Showing a

vague and indistinct knowledge of some of them, is not enough. *Supreme Ct. Sp. T.*, 1867, *Treadwell v. Sackett*, 50 *Barb.*, 44.

ASSOCIATIONS.

As the privileges of membership in a voluntary unincorporated association are not conferred by the sovereign power, but are merely created by the organization itself, courts of law cannot compel the admission of an applicant for membership, nor interfere to restore a member who has been deprived for non-compliance with the conditions on which membership is made to depend. *N. Y. Common Pleas*, 1868, *White v. Brownell*, *Ante*, 162.

ATTACHMENT.

1. Under the provision of § 227 of the Code of Procedure, as amended in 1866,—declaring that for the purpose of the issuing of an attachment in the action, an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced, within thirty days,—the authority for an attachment fails after the lapse of thirty days, if the summons has not been served personally or publication commenced; and the attachment in such case should be set aside. Doubtless the court obtains jurisdiction from the time of the allowance of the provisional remedy, but this jurisdiction must be regarded as provisional or conditional upon the service of the summons within the time specified. *Supreme Ct.*, 1868, *Waffle v. Goble*, 35 *How. Pr.*, 356.
2. If, after the making of such an order for publication, the summons and complaint are served personally upon the defendant, so that publication and mailing are dispensed with under the statute, it is not necessary that a copy of the complaint be filed in order to sustain the service. *Ib.*
3. In an action against partners for a partnership debt, an attachment against part of the partners only, on the ground of non-residence, the others being residents, and therefore not liable to an attachment, can only be levied on the interest of such non-resident partners, and not on the whole partnership property; and if the sheriff levies upon the entire property of the partnership, and sells that without qualification, he is liable to an action therefor. The right of the partners attached to appropriate the partnership property in payment of partnership debts, does not sustain the attachment and sale of the entire interest. *N. Y. Superior Ct.*, 1866, *Berry v. Kelly*, 4 *Rob.*, 106.
4. Where one person fraudulently transfers his money to another, who deposits it in bank in his own name, and receives from the bank certified

BILLS, NOTES AND CHECKS.

checks therefor, a creditor of the former cannot levy an attachment upon the fund in the hands of the bank as a debt due from the bank to the former. However fraudulent the transaction may be as respects creditors, the fund in the hands of the bank belongs to the nominal depositor in whose favor they have certified the checks, and creditors of the fraudulent debtor must obtain judgment and issue execution before they can reach the fund. *Supreme Ct.*, 1868, *Greenleaf v. Mumford*, *Ante*, 130.

5. Thus, a warrant of attachment having been issued against M., the sheriff claimed to levy it upon money deposited in bank alleged to belong to M.; but the bank refused to pay over the deposit, under the attachment, for the reason that the money had in fact been deposited by O., who had drawn checks against it which the bank had certified. It appearing that O. still held the checks unindorsed, the attaching creditors brought an action to prevent O. from indorsing and the bank from paying them, and to procure the fund to be applied to discharge their demand against M.

Held, that the action could not be maintained, even if the money was the property of M., and was deposited in the name of O. for the purpose of protecting it from attachment. Whatever might be the rights of creditors holding *executions* unsatisfied, to reach the fund, it could not be reached by an *attachment* against M., for the reason that the deposit in the name of O. did not create any debt between the bank and M. And the fund, not being liable to attachment as a debt due to M., by the provisions of the Code, could not be subjected to such attachment by a decree in equity. *Ib.*

BAIL.

1. The fact that upon a former trial for murder the jury disagreed, is not, of itself, a controlling reason for admitting the prisoner to bail pending a second trial. *Supreme Ct.*, 1868, *Cole's Case*, *Ante*, 280.
2. The principles which govern criminal courts in allowing persons charged with crime to go at large upon bail,—stated. *Ib.*
3. Where, on a first trial for murder, the jury disagreed, but there was no neglect or delay on the part of the prosecution, in moving a second trial, and no satisfactory evidence that the prisoner was unable to bear the confinement, and the proofs against him upon the principal charge were of a grave character,—*Held*, that an application to discharge him on bail until the second trial, should be denied. *Ib.*

BILLS, NOTES AND CHECKS.

An unqualified authority to draw a bill of exchange may be equivalent to an unconditional promise to pay such bill, upon which the drawee may

CASE.

be holden as upon an acceptance. *Ct. of Appeals*, 1867, *Barney v. Worthington*, *Ante*, 205; *S. C.*, 37 *N. Y.*, 112.

BILL OF PARTICULARS.

A bill of particulars annexed to the complaint forms part of it, and is amendable accordingly. *Ct. of Appeals*, 1867, *Melvin v. Wood*, *Ante*, 438.

BILL OF REVIVOR.

ABATEMENT.

BROOKLYN.

An act to authorize the election of an additional justice of the peace for the city of Brooklyn, and to create an additional district therein. 2 *Laws of* 1868, 1520, ch. 689.

CANALS.

An act in relation to appeals from decisions of canal appraisers. 2 *Laws of* 1868, 1197, ch. 579.

CASE.

1. Upon the trial of a cause by the court without a jury, the proper place for inserting the findings of the court upon matters pertinent to the issues, but not contained in its "decision," is in the "case" prepared for hearing the appeal. *N. Y. Superior Ct.*, 1867, *McKeen v. See*, 4 *Rob.*, 449.
2. It is not an error for the court to omit to state in its decision, under section 267 of the *Code of Procedure*, even facts material to the issue, any more than for a jury to do so in its verdict; the presumption of law being that its findings on such facts are favorable to the successful party, as every thing necessary to sustain a verdict will be intended. *Ib.*
3. Under section 268 of the Code,—giving an appellant a right to have inserted in his "case" a brief specification of the facts found by the court, and its conclusions of law thereon,—he has a right to require any pertinent facts to be passed upon by the court in the settlement of such case, and his redress, if any, for a refusal, must be by appeal from such settlement. *Ib.*
4. When, on the trial of an action, a fact is assumed by the court and counsel to exist, and the case is disposed of upon such assumption, the non-existence of the fact in the case presented to the court, on a motion for a new trial, cannot be urged in opposition to the application for a new trial. [8 *N. Y.*, 78; 22 *Barb.* 656.] *Supreme Ct.*, 1867, *Sipperly v. Stewart*, 50 *Barb.*, 62.

CAUSE OF ACTION.

CAUSE OF ACTION.

1. Where the defendants had bought certain railroad cars, paid for them and received them into their possession, and the seller afterwards induced the plaintiffs to pay him for the same cars, upon the fraudulent representation that he had delivered them to their agent,—*Held*, that the plaintiffs must bear the loss. A charge under such circumstances, that if the defendants had reason to believe that in consequence of a failure to give notice of their title, the plaintiffs would pay the seller for the same cars, and did so pay, the plaintiff's title could not be defeated, is erroneous, unless there be evidence of collusion between the seller and the first purchaser. Their own title being complete, there is no rule of law which would require the defendants to interfere in the affairs of the other parties; especially in a case where, by the provisions of the contract, the purchasers had provided full means to protect themselves against such a fraud. *Ct. of Appeals*, 1867, *Ohio & Mississippi R. R. Co. v. Kasson*, 37 *N. Y.*, 218.
2. That where two parties claim the same payment, the one receiving it to the exclusion of the other is not liable to an action by the other, as for money received in trust, or money had and received. [Distinguishing 5 Paige, 632.] *Ct. of Appeals*, 1867, *Patrick v. Metcalf*, 37 *N. Y.*, 332.
3. Although where a lessor seeks to enter for a breach of a covenant to pay the taxes and assessments, actual payment is not necessary, yet, where he sues merely for damages upon a covenant for its breach he can only recover nominal damages unless he has himself paid it. [11 Johns., 443; 11 Sand., 105; 21 How. Pr., 89.] *N. Y. Superior Ct.*, 1866, *Rector, &c. of Trinity Church v. Higgins*, 4 *Rob.*, 1; 1867, *Id.*, 372.
4. A contract to support an aged person for a weekly payment is one which could be enforced by an action for specific performance against the contracting party; and, therefore, if the other party attempts to terminate it by a notice refusing to make any further payments, the contracting party is at liberty, notwithstanding, to go on with the contract and subsequently sue for payments accrued. This is not like a case of an agreement for personal services of a skilled nature which courts of equity will not specifically enforce because of not having power to carry out their decrees. The contracting party is not limited to an action for damages, because of the impossibility of computing them until after the death of the person whose support was provided for. *Supreme Ct.*, 1867, *Marsh v. Blackman*, 50 *Barb.*, 329.
5. Upon an attachment being levied on a debt due from the present plaintiffs to the debtors in attachment, the plaintiffs paid to the sheriff a sum which they supposed to be the balance due from them to the debtors. They afterwards discovered a mistake in their accounts, showing that the true balance was less than they supposed and had paid.—*Held*, that they could not maintain an action to recover back the excess from the attaching creditors; to whom in the mean time the amount, less fees, had been paid

CASES CRITICISED.

- by the sheriff. The plaintiffs must bear the consequences of their own mistake; the attaching creditors being in no way chargeable with it. *N. Y. Superior Ct.*, 1867, *Duncan v. Berlin*, *Ante*, 34.
6. An action lies by a creditor against a grantee of his debtor who takes a conveyance of property stipulating therein that the conveyance is subject to the payment of certain money to the creditor, the demand so referred to not being a lien upon the property. If the claim were a lien upon the property, such a reference would be construed as merely an acknowledgment that the property was subject to the lien, but where no lien exists the only intent of such a clause in the conveyance would be to furnish evidence that the assignee would pay the amount which the assignor had been bound to pay. *Ct. of Appeals*, 1868, *Dingeldein v. Third-avenue R. R. Co.*, 37 *N. Y.*, 575.
 7. The grounds and extent of the liability of an innkeeper for injury to his guest's horse. *Seymour v. Cook*, 35 *How. Pr.*, 180.
 8. An action cannot be maintained against a corporation by one of its stockholders, to compel it to declare and pay a dividend, from funds on hand. *Supreme Ct. Sp. T.*, 1867, *Karnes v. Rochester and Genesee Valley R. R.*, *Ante*, 107.
 9. An action will not lie to set aside an assignment of property in trust for creditors, which is good upon its face, upon the ground that it was made with intent to defraud creditors, upon mere proof that the assignor, fraudulently (no collusion on the part of the assignee being shown), concealed and withheld from the assignee, assets which ought to have been delivered under the assignment. *Supreme Ct. Sp. T.*, 1868, *Miller v. Halsey*, *Ante*, 28.
 10. The remedy for such acts by an assignor is to be sought in proceedings by the assignee to compel the delivery of the assets withheld. *Ib.*
 11. In an action for relief in equity from a technical forfeiture of a contract by failure to comply with its provisions as to the time of performance, the plaintiff must show good reason for such non-performance, or a peculiar equity entitling him to such relief. If his excuse was sickness or bad weather, as a reason for not complying with a building contract, he should make it out that the non-performance was clearly due to these facts. *N. Y. Superior Ct.*, 1866, *Chase v. Hatch*, 4 *Rob.*, 89.

ACTION; COMPLAINT; INJUNCTION; MONEY RECEIVED; TRADEMARKS; USURY.

CASES CRITICISED.

1. The case of *McVicker v. Ketchum* (1 *Ante*, 452),—disapproved. *Bell v. Richmond*, *Ante*, 44.
2. The case of *People v. Enöch*, 13 *Wend.*, 159, approved and followed. *Fitzgerald v. People*, *Ante*, 68; *S. C.*, 37 *N. Y.*, 413.
3. The case of *Trigg v. Hitz* (17 *Abb. Pr.*, 436), approved, but distinguished. *Johnston v. Lewis*, *Ante*, 150.

CERTIORARI.

4. The decision at special term in the case of *White v. Brownell*, 3 *Ante*, 318,—affirmed. *White v. Brownell*, *Ante*, 162.
5. The decision at special term in this cause (reported 3 *Ante*, 467),—explained. *Wood v. Mayor, &c. of N. Y.*, *Ante*, 152.

CHATTEL MOTRGAGE.

1. After the designation of specific goods in a chattel mortgage, the words "and all other goods and chattels now in my store at," &c., are sufficient to embrace all the goods of the mortgagor in the store at the time. *Ct. of Appeals*, 1868, *Russell v. Winne*, *Ante*, 383.
2. Mortgages of railroad companies need not be filed as chattel mortgages, if recorded as a mortgage of real estate, in each county in or through which the road runs. 2 *Laws of* 1868, 1747, ch. 779.
3. One who purchases property covered by a chattel mortgage, from a purchaser from the mortgagor, is a "subsequent purchaser," within the meaning of *Laws of* 1833, 402, § 3,—providing that a chattel mortgage shall cease to be valid as against subsequent purchasers, &c., after the expiration of one year from the filing thereof, unless refilled,—notwithstanding his purchase was not directly from the mortgagor; and a refiling, &c., is necessary to prevent his purchase from overreaching the mortgage. *Ct. of Appeals*, 1867, *Dillingham v. Bolt*, *Ante*, 221; S. C., 37 *N. Y.*, 198.
4. Where the mortgagor in a chattel mortgage removes from the State, the mortgagee must, as against creditors, subsequent purahasers, &c., take advantage of his mortgage within the year, or lose the benefit of it. Refiling the mortgage in the town in which the mortgagor formerly resided, is of no avail. *Id.*

CITY JUDGE (OF NEW YORK).

The city judge of the city of New York has not jurisdiction to entertain proceedings under the act of 1831, for the arrest of fraudulent debtors.—*So held*, on a review of the legislation with reference to the judges of the city of New York. *Supreme Ct.*, 1868, *People v. Goodwin*, 50 *Barb.*, 562.

CERTIORARI.

1. That any error in the direction of the writ, or in the return thereto, is waived by submitting to a hearing on the merits. *Supreme Ct.*, 1867, *People v. City of Brooklyn*, 49 *Barb.*, 136.
2. Supreme court may award a *certiorari* to examine any adjudication made on applications under the act relative to summary proceedings to recover the possession of land. But the proceedings on any such application shall not be stayed or suspended by such writ of *certiorari*, or any other writ or order of any court or officer. 2 *Laws of* 1868, 1932, ch. 828, § 5, amending the Revised Statutes.
3. Saving clause as to judgments heretofore rendered. *Id.*, § 6.

COMPLAINT.

COMPLAINT.

1. The provision of the Code,—requiring that the complaint shall contain a plain and concise statement of the facts which constitute the cause of action,—applies to each count of the complaint; and the general allegation that the second cause of action arose out of transactions connected with the first, does not establish a case within the above rule. *Supreme Ct.*, 1867, *Flynn v. Bailey*, 50 *Barb.*, 73.
2. It is not necessary that a complaint on a bill of exchange drawn under a promise to accept such bill when drawn, should aver an acceptance. A complaint which avers the promise to accept, and the refusal, is sufficient, in that respect. *Ct. of Appeals*, 1867, *Barney v. Worthington*, *Ante*, 205; *S. C.*, 37 *N. Y.*, 112.
3. What averments in a complaint are sufficient to show a cause of action for use and occupation. *N. Y. Superior Ct.*, 1868, *Coit v. Planer*, *Ante*, 140.
4. Under the act of Mar. 20, 1860 (*Laws of 1860*, 157, § 1),—which exempts the separate property of a married woman from liability for debts of her husband, except such as may have been contracted for support of “herself or her children,”—it is not sufficient to allege in the complaint in an action to charge her estate, that the debt was contracted for the support of herself and her family. *N. Y. Com. Pl. Sp. T.*, 1867, *Valentine v. Lloyd*, *Ante*, 371.
5. An action to reach the separate estate of the wife, in a case within the act, should be special, seeking that relief only; and it is not competent to join both husband and wife, and ask a general judgment against both, as well as an execution against her separate estate. *Id.*
6. *It seems*, that bringing an action without leave of court, where it is required by section 71 of the Code, is a mere irregularity. The leave is not a part of the cause of action. *N. Y. Superior Ct.*, 1866, *Lane v. Salter*, 4 *Rob.*, 239.
7. Under a complaint alleging a demand which accrued jointly to the plaintiff and a third person, and an assignment thereof to the plaintiff, the plaintiff may recover on proving a claim which accrued to the third person alone, and had been assigned by him to the plaintiff. *Supreme Ct.*, 1868, *Read v. Jaudon*, 35 *How. Pr.*, 303.
8. In an action alleging as the cause of action the *conversion* of plaintiff's trunk by the defendants as common carriers, the plaintiff cannot recover without some proof of an absolute appropriation of it by the defendants to their own use, or, what is equivalent, parting with it to others without plaintiff's authority. If he relies on mere non-delivery and loss, he must state the cause of action accordingly, as would have been done in a special action on the case, or assumpsit for a breach of the undertaking to carry. *N. Y. Superior Ct.*, 1868, *Tolano v. National Steam Navigation Co.*, 35 *How. Pr.*, 496.

CONSTITUTIONAL LAW.

9. Substance of a complaint against the collector of an estate, in an action to require him to account,—*Held*, sufficient on demurrer. *Ct. of Appeals*, 1867, *Christy v. Libby*, 35 *How. Pr.*, 119.
10. In a complaint to charge the trustees of a corporation with debts of the corporation on account of their default in not filing an annual report, a general allegation that no report was filed, as by law required, is not sufficient, and does not cure the defect in a more special allegation that no report was filed verified by the president and secretary. Verification by one of such officers is sufficient. *N. Y. Superior Ct. Sp. T.*, 1865, *McHarg v. Eastman*, 4 *Rob.*, 635.
11. An allegation that the report was not filed with the clerk of the county where the company actually carried on its business, is not sufficient, but the allegation must refer to the place designated in the certificate of incorporation. The statute requires the report to be filed in that place. *Ib.*

ACTION; CAUSE OF ACTION; PLEADING; VARIANCE.

COMPROMISES.

Compromises not allowed, of prosecutions under this act for preservation of fish and game, except by approval of district-attorney. 2 *Laws of 1868*, 1765, ch. 785, § 22.

CONTEMPT.

1. For the purpose of sustaining a motion to punish for a contempt in violating an injunction as to trademarks, it should appear clearly that the ordinary mass of customers, paying that attention which such persons usually do in purchasing, would be easily deceived by the label used by the defendant. *N. Y. Superior Ct.*, 1865, *Swift v. Dey*, 4 *Rob.*, 610.
2. Where the owner of land had threatened to close the plaintiff's way over it, and there was reason to believe that after an injunction forbidding it had been served upon him, he encouraged the making of a fence by a third person,—*Held*, that it was his duty to have prevented the erection, after the service of the order on him, and he was liable to an attachment for contempt. "*Qui potest et debet retare et non relat, jubet*," applies to him. [15 *How. Pr.*, 81; 9 *N. Y.*, 263, 278.] *N. Y. Com. Pl. Sp. T.*, 1867, *Wheeler v. Gilsey*, 35 *How. Pr.*, 139.

CONSTITUTIONAL LAW.

1. The act of 1866, ch. 74,—establishing the Metropolitan Board of Health,—is not obnoxious to the objection of unconstitutionality, because it authorizes the board to determine certain sanitary questions relating to nuisances and matters dangerous to the public health, without a trial by jury. In questions relating to the public health, where the public interests require action to be taken, a jury had not been the ordinary tribunal to

CORPORATIONS.

determine such questions prior to the constitution of 1846. *Ct. of Appeals*, 1868, *Metropolitan Board of Health v. Heister*, 37 *N. Y.*, 661. To the same effect, *N. Y. Superior Ct.*, 1867, *Reynolds v. Schultz*, 4 *Rob.*, 282; where other objections to the constitutionality of the act are also overruled.

2. Nor is the act objectionable on the score of vesting judicial powers in officers not chosen in the mode prescribed for the choosing of judicial officers by the constitution. The power exercised by the board is administrative rather than judicial. *Ct. of Appeals*, 1868, *Metropolitan Board of Health v. Heister*, 37 *N. Y.*, 661.
3. The provision of section 16 of article III. of the constitution of 1846,—that no private or local bill shall embrace more than one subject, which shall be expressed in its title,—is confined to private or local laws. It has no effect upon the general statutes; but they may embrace as many subjects as the legislature see fit to include in them. *N. Y. Superior Ct. Sp. T.*, 1868, *Burnham v. Acton*, *Ante*, 1.

CONVERSION.

Money is as much the subject of conversion as is any other personal chattel. *Ct. of Appeals*, 1867, *Gordon v. Hostetter*, *Ante*, 263.

CORPORATIONS.

1. What inspection of the records of a corporation, a stockholder may claim and enforce by mandamus under the statute. *People ex rel. v. Pacific Mail Steamship Co.*, 50 *Barb.*, 280.
2. A corporation chartered for the purpose of receiving and holding in trust property committed to them by bequest, &c., in trust for an unincorporated association, with power to execute any trusts confided in them by such association, may take a fund bequeathed to them to be expended under the direction and for the appropriate uses of a committee of such association.—FULLERTON, J. *Ct. of Appeals*, 1867, *Harris v. American Bible Society*, *Ante*, 421.
3. The provisions of the Revised Statutes (2 *Rev. Stat.*, 461), entitled "Of proceedings against corporations in equity," are not repealed or abolished by chapter 226 of the Laws of 1849 (*Laws of 1849*, 340) entitled "An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations." Therefore, under the Revised Statutes, proceedings may still be instituted by the people, through their attorney-general, for the dissolution of a moneyed corporation, and the appointment of a receiver to wind up its affairs. This right was not intended to be in any wise impaired by the act of 1849. So far as this question is concerned, they do not necessarily conflict, and may well stand together. [Qualifying 5 *Abb. Pr.*,

COSTS.

343.] *Supreme Ct.*, 1867, *People v. Central City Bank*, 35 *How. Pr.*, 428.

COSTS.

1. Where a defendant, sued for wrongfully breaking and entering the plaintiff's close, justifies a trespass on a certain specified piece of ground, alleging that it was a public highway, and upon this question of title the cause is transferred to the supreme court, and the defendant succeeds in justifying all his acts upon the strip of land described by him, by showing that it was a highway, but it appears, also, that he trespassed outside of such piece, for which trespass he had no justification, and less than fifty dollars damages are recovered by the plaintiff therefor, the plaintiff is entitled to costs. [30 *How. Pr.*, 15.] *Supreme Ct. Sp. T.*, 1868, *Heath v. Barmour*, 35 *How. Pr.*, 1.
2. Where, in a justice's court, in an action for trespassing upon land, the defendant interposes a plea of title as to a *part of the lands* only, the plaintiff, if he would recover for the trespass on the other part only, may amend his complaint. If, instead of so doing, or discontinuing the action in part, he only should remove it to the supreme court on a certificate that the plea of title is involved, and he there recovers less than \$50 for trespasses upon that part of the land not covered by the plea of title, he cannot recover costs. *Supreme Ct.*, 1867, *Shull v. Green*, 49 *Barb.*, 311.
3. Under section 61 of the Code of Procedure,—which regulates the recovery of costs in actions in the supreme court, originally commenced before a justice of the peace, and transferred to that court on a plea of title, and which declares that “if the judgment in the supreme court be for the plaintiff he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial,”—the judgment for the plaintiff which must be recovered in order to entitle him to costs, must be a judgment on the issue presented by a plea of title. *Supreme Ct.*, 1867, *Morss v. Jacobs*, 35 *How. Pr.*, 90.
4. In such a case the defendant, instead of justifying generally, should in his answer have carefully described the highway, and limited his justification to the premises so described; and then, as to all alleged trespasses other than those within the limits described, he could have interposed a denial, or license, or any defense he had other than title. The justice, upon the giving of the undertaking, would dismiss the action as to the alleged trespasses upon the close embraced by the answer setting up the title, and would proceed to the trial of the issues touching the alleged trespasses not justified by the plea of the title, in case the plaintiff should decide to proceed in his action for such trespasses. If the plaintiff should not claim that any trespasses were committed outside of the *locus* particularly described by the defendant, then the action would be dismissed generally. *Supreme Ct. Sp. T.*, 1868, *Heath v. Barmour*, 35 *How. Pr.*, 1.

COSTS.

5. *It seems*, that that the provisions of *Laws of 1859*, ch. 262, section 2,—that no costs, &c., shall be recovered against a municipal corporation unless the claim was presented for payment to the chief fiscal officer of the corporation, before the suit,—does not apply to actions for unliquidated damages arising *ex delicto*;—*e. g.*, to a claim for damages for property destroyed by a mob. *McClure v. Supervisors of Niagara County*, *Ante*, 202.
6. In an action to recover for the storage of merchandise a sum exceeding \$400, the limit of a justice's jurisdiction, the defendants set up a claim for loss, also exceeding the limits of a justice's jurisdiction; and upon the trial, both the claims being established, the plaintiff recovered a balance of five cents, being the excess of his claim over the defendant's set-off.—*Held*, that the plaintiff was entitled to costs of the action. Section 304 of the Code of Procedure, subd. 3,—which gives costs to the plaintiff upon a recovery in the actions of which a court of a justice of the peace has no jurisdiction,—must be regarded as applicable to such a case as this; and under it, the plaintiffs are entitled to costs notwithstanding subdivision 4 refuses the plaintiff costs unless he recovers fifty dollars. There is no other way of harmonizing subdivision 3 and 4, or making both of them operative, but by allowing full force to subdivision 3 in all cases to which it is applicable, and limiting the operation of subdivision 4 to cases which are not covered by subdivision 3. *Supreme Ct. Sp. T.*, 1867, *Griffen v. Brown*, 39 *How. Pr.*, 372.
7. Costs allowed without regard to the amount of recovery, in an action in the supreme court for penalties under this act for the preservation of fish and game. 2 *Laws of 1868*, 1764, § 20., ch. 785.
8. An erroneous decision of the trustees of a school district in the assessment of a tax, is a proper subject of appeal to the superintendent. *Ct. of Appeals*, 1868, *Clark v. Tunnichiff*, *Ante*, 451.
9. Hence, if any person, whether a resident or not, aggrieved by a levy on his property under such assessment, sues the officers, instead of taking such appeal, he may be refused costs, if the judge certify that the defendants acted in good faith, &c. *Ib.*
10. Of the intent and effect of the sections of the Code of Procedure giving costs to the successful party. *Ib.*
11. A general certificate of good faith, &c., granted under the statute, will exonerate the defendant from costs of an unsuccessful motion for a new trial, previously made and denied with costs. *Ib.*
12. In an action against public officers, to enjoin certain official action contemplated by the defendants, double costs cannot be recovered under the statute (2 *Rev. Stat.*, 617, § 24). The statute only relates to actions to recover for some act *done by* an officer, or for some *omission* of duty. Moreover, the statute does not apply to actions of purely equitable cognizance. *Supreme Ct.*, 1867, *Stewart v. Schultz*, 50 *Barb.*, 192; *Davis v. Cooper*, *Id.*, 376.
13. The opening of the cause, introduction of evidence, and summing up by

COSTS.

- counsel to the jury, or submitting of the cause to the court or referee, on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact. Such trial is not completed until finally submitted to the court, referee or jury. If more than two days are necessarily occupied in completing the trial, including the preparation and submission of written points or arguments, if that way of submission is agreed upon, the party succeeding is entitled to the additional \$10, under subdivision 4 of section 307 of the Code. *Supreme Ct.*, 1867, *Mayor, &c. of New York v. Ryan*, 35 *How. Pr.*, 408.
14. That upon dismissing an action for want of jurisdiction, the court has no power to render judgment for costs against the plaintiff. *N. Y. Superior Ct.*, 1865, *Sullivan v. Frazee*, 4 *Rob.*, 616.
 15. The costs of an attachment issued to enforce the order of the court in proceedings supplementary to execution, are to be regarded as the costs of proceedings in the action, and taxed accordingly, and not as the costs of special proceedings other than actions. *Supreme Ct.*, 1868, *Seeley v. Black*, 35 *How. Pr.*, 369.
 16. An action to obtain the construction of a will, and to obtain directions how to proceed under it, is one of those in which only the allowance specified in section 308 of the Code can be made; and the court has not the power to make a further allowance of costs in such action under section 309. *Ct. of Appeals*, 1867, *Downing v. Marshall*, 37 *N. Y.*, 380.
 17. In an action prosecuted by a receiver to collect money to increase the fund in his hands, if the defendant prevails he is entitled to costs out of the fund, immediately. He is not required to accept a payment *pro rata* with the general creditors of the estate. *Ct. of Appeals*, 1868, *Columbian Ins. Co. v. Stevens*, *Ante*, 122.
 18. Where the statute contains a fee bill, there can be no discretion in the court as to the amount of the items specified. The court has no authority to add items for services not specified in the statute. *Ct. of Appeals*, 1867, *Downing v. Marshall*, 37 *N. Y.*, 380.
 19. But persons acting in *autre droit*, as executors, administrators, trustees, guardians, receivers, &c., are, upon a faithful execution of their trusts, to be indemnified out of the trust property, for all expenses necessarily incurred in the faithful performance of their duties. [2 *Wil. on Ex.*, 1137; 2 *Brown Ch.*, 663; 10 *Ves.*, 184; 1 *Id.*, 243; *Lewin on Trusts* (Phil. ed., 1858), 557; *Beames on Eq. Costs*, 13 *et seq.*, 157 *et seq.*, 214 *et seq.*; *Tiff. & B. on Trusts*, 697.] And executors, administrators, and trustees, in a proper case, may be allowed reasonable sums upon this principle, which is entirely independent of any statutes relating to costs. The provision of the Code does not restrict the power of the court in such a case to give indemnity to a faithful trustee or executor. *Ct. of Appeals*, 1867, *Downing v. Marshall*, 37 *N. Y.*, 380.
 20. The court of appeals, however, will review the discretion exercised by the court below in such an allowance, so far as to reduce the amount if unreasonable. *Id.*

COURTS.

21. The settled rule of the courts, to allow to trustees only the same commissions as the statute allows to executors and guardians for similar services, is not applicable to receivers appointed by the court in actions pending therein. *So held*, of a receiver appointed to receive and apply rents pending a controversy arising on the probate of a will. *Ct. of Appeals*, 1867, *Gardiner v. Tyler*, *Ante*, 463.

COUNTY CLERK.

1. The office of the county clerk of Erie to be open every day, Sundays and legal holidays excepted, from 9 to 5. 1 *Laws of 1868*, 779, ch. 361.
2. Fees of the county clerk of Kings county for searches, &c.,—prescribed. 2 *Laws of 1868*, 1626, ch. 720.

COUNTER-CLAIM.

1. A demand against a plaintiff which exists in favor, not of the defendant, but of a third person, cannot be the basis of a counter-claim, so that the averment of it in the answer will be deemed admitted if not traversed by a reply. *Ct. of Appeals*, 1867, *Bates v. Rosekrans*, *Ante*, 276; S. C., 37 N. Y., 409.
2. In an action by a tenant, a municipal corporation, to annul an executory agreement for a lease under which the corporation have occupied, on the ground that fraud was practiced in procuring them to take it, the landlord may set up a counter-claim for rent accrued by such occupancy. The proposed lease, and the resolution of the corporation to accept it, are to be regarded as "the transaction" constituting the foundation of the plaintiff's claim. *Supreme Ct. Sp. T.*, 1868, *Mayor, &c. of N. Y. v. Wood*, *Ante*, 332.
3. The charges of fraud being unsustained, the defendant may, upon such counter-claim, recover rent down to the time of the commencement of the action. *Ib.*
4. The defendant may be allowed, at his option, to enter judgment for a specific performance of the agreement to execute the lease. *Ib.*
5. Where a defendant has set up in his answer counter-claims against the plaintiff, and on the trial the complaint is dismissed, on his motion, the plaintiff, having excepted to such dismissal, has a right to insist that such counter-claims shall be passed upon by the jury in the action, and that the defendant, after having made the issue, shall not be allowed to withdraw it, so as to reserve the right of bringing a new action for the same cause. [1 *Code Rep. N. S.*, 121; *Id.*, 1, 105.] *N. Y. Superior Ct.*, 1865, *Miller v. Freeborn*, 4 *Rob.*, 608.

COURTS.

1. Judges of court of sessions and oyer and terminer especially to charge the grand jury at every term to take notice of all offenses in violation of this act against obscene literature. 1 *Laws of 1868*, 858, ch. 430, § 4.

COURTS OF SESSIONS.

2. The manner in which the place for holding a court in certain cases, is fixed. *Northrop v. People, Ante, 227.*

COURT OF APPEALS.

1. An order denying a motion to vacate an attachment, where the motion was made on the ground that, as matter of law and strict right the attachment was illegal, is appealable to the court of appeals. *Ct. of Appeals, 1868, Tracy v. First National Bank of Selma, 37 N. Y., 523.*
2. The judgment of the supreme court at general term upon a *certiorari* to review adjudications in summary proceedings relative to the possession of land, shall be final, unless an appeal shall be allowed by the said court, at a general term, before the end of the term next after that at which the judgment was rendered. The appeal upon any such judgment rendered upon any such *certiorari* may be brought on for argument as a preferred cause at any term of the court of appeals by either party, upon fourteen days' notice. *2 Laws of 1868, 1932, § 5.*
3. The court of appeals cannot review a decision of the court below, affirming the judgment of a referee on a question of fact. *Ct. of Appeals, 1867, Wiltsie v. Eaddie, Ante, 393.*
4. The objection that a judgment was erroneously entered for a larger amount than was authorized by the general term is not the subject of an appeal to this court, but should be corrected by motion made in the court below. *Ct. of Appeals, 1868, Binsse v. Wood, 37 N. Y., 526.*
5. Where a pleading is sustained, the demurrer being overruled, and leave is given to answer the pleading, the demurrant is put to his election to answer over or submit to judgment; and if he submit to judgment, and appeal therefrom to this court, such appeal comes here on the question of affirmance or reversal only; and no leave to the demurrant to answer or plead anew can be given. The judgment here is absolutely final. *Ct. of Appeals, 1868, Whiting v. Mayor of N. Y., 37 N. Y., 600.*
6. Where, on an appeal from an order *sustaining* a demurrer, the court of appeals reverse the order, they may allow the defendant to plead over; and they should do this where it appears that the demurrer was put in in good faith, and the case is one in which the court below should have granted leave to plead over. *Ct. of Appeals, 1868, Fulton Fire Ins. Co. v. Baldwin, 37 N. Y., 648.*

APPEAL; CASE.

COURTS OF SESSIONS.

1. *It seems,* that the court of general sessions in the city of New York has power to entertain a motion for a new trial. *Supreme Ct., 1867, Lanergan v. People, 50 Barb., 266.*
2. Courts of special sessions have jurisdiction of offenses under this act for the preservation of fish and game. *2 Laws of 1868, 1764, § 20, ch. 785.*

COURTS, 1.

DAMAGES.

CREDITOR'S ACTION.

1. An action does not lie by a creditor having issued an attachment, to prevent a transfer of the fund which he seeks to reach to enforce his lien upon it. *Supreme Ct.*, 1868, *Greenleaf v. Mumford*, 50 *Barb.*, 543.
2. A creditor by attachment, not yet having recorded judgment and issued execution, cannot maintain an action to reach intangible property, choses in action, belonging to his debtor, such as could not be taken on execution, and such as the sheriff holding the attachment is authorized by the provisions of the Code of Procedure to sue for and recover. Although a creditor is allowed to maintain an action to enforce the execution against leviable property, the sheriff is the proper person to bring such action in the cases in which he is authorized to do so, for the collection of assets which cannot be seized on execution. *Supreme Ct.*, 1867, *Mechanics & Traders' Bank v. Dakin*, 59 *Barb.*, 587.

CRIMINAL LAW.

1. Proceedings under the act for the preservation of fish and game. *Laws of* 1868, 1764, § 20, ch. 785.
2. History and construction of the statutes of New York defining the crime of murder. *Ct. of Appeals*, 1868, *Fitzgerrold v. People*, *Ante*, 68; S. C., 37 *N. Y.*, 413.
3. Magistrates, on sworn complaint, to issue warrants for search for and seizure of obscene publications, &c. 1 *Laws of* 1868, 358, ch. 430, § 3.
4. Owners of orchards, &c., or their servants may arrest and convey before a magistrate any person violating the provisions of this act against trespassers. 2 *Laws of* 1868, 1402, ch. 645, § 3.

ARREST; WARRANT.

DAMAGES.

1. In an action for a breach of contract, the damages to be recovered are those that flow naturally and directly from the breach of the contract; they do not embrace speculative profits, nor damages which could have been avoided by the reasonable exertions of the party injured, and if such damages are enhanced by his negligence or willfulness, the increased loss justly falls on him. [1 *Law R.*, 177, 191; 9 *Exch.*, 341; 14 *Irish Com. Law*, 43; 16 *N. Y.*, 495; 28 *Id.*, 72.] *Ct. of Appeals*, 1867, *Milton v. Hudson River Steamboat Co.*, 37 *N. Y.*, 210.
2. The principle of contributory negligence may be applied to actions for breach of contract, as well as to actions for tort. *Ib.*
3. A sum expressed in a contract as agreed on as a liquidated amount of damages, not to be construed by the court as a penalty merely because it is excessive. *Supreme Ct.*, 1868, *Leggett v. Mutual Ins. Co. of N. Y.*, 50 *Barb.*, 616.

DEFENSES.

4. Interest is properly recoverable upon an amount recovered in an action for the rent of a boat. *Supreme Ct.*, 1867, *Sipperly v. Stewart*, 50 *Barb.*, 62.
5. In a married woman's action for negligence resulting in personal injuries to herself, expenses of medical attendance, &c., are not recoverable as an item of damage, unless she charged her separate property therewith. *Supreme Ct.*, 1868, *Moody v. Osgood*, 50 *Barb.*, 628.
6. Measure of damages in an action to recover the value of goods sold to a third person upon defendant's false representations as to his solvency. *Von Bruck v. Peyser*, 4 *Rob.*, 513.
7. As to pecuniary injuries sustained by the next of kin, in case of death by negligence, the statute has set no bounds to the sources thereof; and they may be such as arise from the loss of personal care, intellectual culture, or moral training, which would have been received had the deceased lived. *Ct. of Appeals*, 1867, *McIntyre v. N. Y. Central R. R. Co.*, 37 *N. Y.*, 287.
8. Measure of damages in an action for non-delivery of bonds payable in gold. *Simpkins v. Low*, 49 *Barb.*, 382.
9. The measure of damages in an action to recover for the conversion of stocks and coin purchased by a broker for the plaintiff. *Taylor v. Ketchum*, 35 *How. Pr.*, 289.
10. The measure of damages for taking lands for a railroad, as affected by apprehended danger from fire. *Matter of Union Village*, 35 *How. Pr.*, 420.
11. Two hundred and fifty dollars not unreasonable compensation for injury diminishing yearly rental one hundred dollars. *Supreme Ct.*, 1868, *Smith v. Felt*, 50 *Barb.*, 612.
12. The rule of damages in an action for the failure of defendant to deliver to the plaintiff, according to contract, merchandise to be sold by the latter and accounted for at a stated price, is not the rule applicable as between vendor and vendee. *Supreme Ct.*, 1867, *Giles v. Morrison*, 50 *Barb.*, 50.

DEFENSES.

1. In an action upon a promissory note, the defendant may, under the Code of Procedure, set up in defense a contemporary agreement for a delivery of property to the payee, such as would constitute in equity the foundation of a claim upon defendant's part for the surrender of the note. *Supreme Ct.*, 1867, *Van Valkenburgh v. Stupplebeen*, 49 *Barb.*, 99.
2. It is a good defense to an action upon a promissory note, brought by a party who acquired it with knowledge of the facts, that it was exacted from the maker at a time when he was under arrest upon a criminal charge, by the parties who procured his arrest, and as a settlement of claims held by them against him; notwithstanding the note was taken as a settlement of a civil claim for damages only, and without compounding the criminal charge. *Ct. of Appeals*, 1867, *Osborne v. Robbins*, *Ante*, 15.

DEFENSES.

3. Evidence of the circumstances attending the making of such a note, is competent to sustain the defense. *Ib.*
4. The giving of a new note by one of two joint and several makers of a former note, as a provision for the payment of the former note, but without an agreement that such new note shall be received as payment, and without its being in fact paid, constitutes no defense to the original note. *Ct. of Appeals*, 1867, *Bates v. Rosekrans*, *Ante*, 276; *S. C.*, 37 *N. Y.*, 409.
5. An unsealed receipt, given by one of two joint creditors, expressed to be in full of his moiety of the debt, but for a sum of money less than a moiety, and without any new consideration, does not split the demand; and constitutes no bar to an action by both creditors to recover the balance due. *Ct. of Appeals*, 1867, *Carrington v. Crocker*, *Ante*, 335.
6. If, in such a case, a subsequent release under seal be shown, expressing a new consideration, and releasing the debtor as to one moiety, the misjoinder of the releasor may be cured on the trial, by striking out his name, and the other creditor may recover his moiety. *Ib.*
7. The original part payment, although it may have been intended by the creditor receiving it, to extinguish one-half the demand, operated only *pro tanto*; and therefore may be relied on by the other creditor, as an acknowledgment of his demand, sufficient to take it out of the statute of limitations. *Ib.*
8. His subsequent assent to it as payment of one-half, by suing for the other half, does not relate back, so as to change the effect of the payment as an acknowledgment. *Ib.*
9. It is a good defense to an action upon an award of arbitrators, to show that the arbitrators proceeded without notice to the defendant, and that they made the award in suit before the defendant had closed his proofs. *N. Y. Superior Ct. Sp. T.*, 1868, *Garvey v. Carey*, *Ante*, 159.
10. So is the fact of a mistake in ascertaining the amount due; and a general allegation that the arbitrators "made a mistake in such computation, which mistake was a clerical error, and that the award was the result of such clerical error," is sufficient to admit proof. *Ib.*
11. The power of a municipal corporation to designate portions of the streets for standing places of hackney-coaches, is to be exercised with discretion, and their direction does not amount to a defense to the owner of coaches so stationed, against a private action for injunction and damages for obstructing the entrance to the plaintiff's premises upon the street. *N. Y. Superior Ct. Sp. T.*, 1868, *Masterson v. Short*, 35 *How. Pr.*, 169.
12. The inability of the principal, by reason of sickness, to appear at court and answer to an indictment found against him, according to the terms of his recognizance, is a good defense to an action brought against his sureties upon the recognizance. Such disability, when occasioned by the principal being thrown from a horse just prior to the term of the court, is such an act of God as will excuse the performance of the contract by his sureties. [20 *N. Y.*, 197; 24 *Barb.*, 174; 12 *Wend.*, 589; 19 *Id.*, 297; 3 *Hill*, N. S.—Vol. IV.—33.

DEMURRER.

- 570; 30 Barb., 110.] *Ct. of Appeals*, 1868, *People v. Tubbs*, 37 N. Y., 586.
13. The question of usury is personal, and can only be raised by the parties to the transaction. *Ct. of Appeals*, 1867, *Ohio, &c. R. R. Co. v. Kasson*, 37 N. Y., 218.
14. In an action by a purchaser for value from a married woman, of land which her husband purchased, but which was conveyed to her in her own name, and which she afterwards conveyed to plaintiff, brought to recover possession of the land, a parol agreement between the husband and the wife, though made before the plaintiff's purchase, that the land should be considered as belonging to a child of the husband and wife, and should be held by the husband in trust for the benefit of such child, forms no defense. *Supreme Ct.*, 1868, *Gray v. Croquet*, *Ante*, 113.
15. Nor is the fact that the husband procured the conveyance of such property to his wife for the purpose of securing a home for himself and family in case of future misfortunes, any defense to such an action. *Id.*

ANSWER; COUNTER-CLAIM; DEMURRER; LIMITATIONS; SET-OFF.

DELIVERY.

Where the grantor in a deed hands the same to another person with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending upon any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent, and a mechanic's lien, filed afterward against the grantor, does not attach. *Supreme Ct.*, 1867, *Ernst v. Reed*, 49 Barb., 367.

TENDER.

DEMAND BEFORE SUIT.

APPEAL, 9; COSTS, 5.

DEMURRER.

1. If the defendant would raise the objection that the complainant does not state facts sufficient to constitute a cause of action as to one or more of several plaintiffs, the demurrer must specify the plaintiff to whom he objects as a party, so that the complaint can be dismissed as to that plaintiff. If he does not do so, the objection is not available. *Supreme Ct.*, 1867, *Richtmyer v. Richtmyer*, 50 Barb., 55.
2. The defect of parties for which a demurrer is allowed under section 344 of the Code, is a deficiency of, and not too many, parties. [20 Barb., 342; 23 How. Pr., 396; 12 Id., 134; Id., 547; 1 Abb. Pr., 82; Id., 44; Barb. on Parties, 544; 16 Barb., 541.] The joinder of too many parties as defendants, when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the plaintiff states a good

DISCOVERY AND INSPECTION.

cause of action. [17 N. Y., 592, 604.] *Supreme Ct.*, 1867, *Richtmyer v. Richtmyer*, 50 *Barb.*, 56.

3. In an action by plaintiffs in a corporate name the objection that they are not incorporated and have not a capacity to sue, is not available under a demurrer assigning only as ground thereof that the complaint does not state facts sufficient to constitute a cause of action. Under such a demurrer the objection to their capacity to sue must be regarded as waived. *Ct. of Appeals*, 1868, *Fulton Fire Ins. Co. v. Baldwin*, 37 *N. Y.*, 648.

COMPLAINT, 9; PLEADING.

DEPOSITIONS.

1. Depositions may be taken by a commissioner of emigration respecting the complaints relating to the shipping, or treatment of passengers, &c. Proceedings thereon, and effect as evidence. 2 *Laws of 1868*, 2040, ch. 857.
2. On an application for an order appointing a referee to take an affidavit or deposition of a person who refuses to make the same, to be used on a motion, under section 401 of the Code of Procedure, no notice need be given to the adverse party, and he has no right to appear and cross-examine witnesses. The order is exclusively a matter between the moving party and the witness, and the adverse party can only move to have it vacated. *Supreme Ct. Sp. T.*, 1868, *Erie Railway Co. v. Champlain*, 35 *How. Pr.*, 73.
3. Where it is proved that the witness resides out of the State, and that inquiries had been made at the time of the trial at his usual place of stopping when in the State, and the result left a reasonable ground to infer his absence from the State, the deposition *de bene esse* is admissible. [6 *Bosw.*, 621; 10 *Barb.*, 175.] *Ct. of Appeals*, 1867, *Brouwer v. Frauenthal*, 37 *N. Y.*, 166.

DIRECTORS.

An action does not lie by a creditor of a corporation,—*e. g.*, the bill-holders of a bank,—against the directors, for misconduct by which their demand was made worthless. *Supreme Ct. Sp. T.*, 1867, *Branch v. Roberts*, 50 *Barb.*, 435.

DISCONTINUANCE.

A discontinuance obtained corruptly from the clerk of an attorney set aside. *N. Y. Superior Ct. Sp. T.*, 1865, *Irvine v. Spring*, 35 *How. Pr.*, 479.

DISCOVERY AND INSPECTION.

1. Although in general the court will not order a discovery and inspection of documents upon a general allegation that a document contains evidence to the effect that the plaintiffs have no legal claim against a defendant,

DIVORCE.

without putting the court in possession of the facts, yet, where the allegation is not on information and belief that the paper set forth contains evidence showing, or tending to show, that the plaintiffs have no legal claim, and this allegation is not controverted by the plaintiffs, the allegation may be regarded as sufficient. *N. Y. Superior Ct.*, 1866, *Livermore v. St. John*, 4 *Rob.*, 12.

2. Defendants may have an order requiring the plaintiffs to make discovery of a letter written by the defendants to the plaintiffs, if the letter was in answer to a letter written by the plaintiffs to the defendants, which is relied on as evidence in the action. Although letters or other declarations of a party are not in general evidence in his own favor, yet they may be evidence when in response to the proven declarations or letters of the other party. *Ib.*

DISMISSAL OF COMPLAINT.

1. The objection that the complaint does not state facts sufficient to constitute a cause of action, may be taken at any stage of the proceedings; and a motion before the referee, to dismiss the action for such a cause, is proper. This objection need not be taken by answer or demurrer, but is available in any stage of the action. This practice has been sanctioned by several adjudications, and is very commonly resorted to at the circuit, sometimes after the evidence is all in, when it performs the office substantially of a motion in arrest of judgment, or for judgment *non obstante veredicto* under the old practice, and where the point is plainly and clearly presented on the pleadings, upon the plaintiffs opening, and without going into evidence at all. [19 *Barb.*, 195; 10 *Id.*, 447; 20 *N. Y.*, 63.] *Ct. of Appeals*, 1863, *Coffin v. Reynolds*, 37 *N. Y.*, 640.
2. Where, after service of the summons and complaint, the defendants stay the plaintiff's proceedings until the costs of a former suit are paid, the defendants cannot move, under section 274 of the Code of Procedure, to dismiss the complaint, if the costs have not been paid, and the stay is still in force. *N. Y. Superior Ct. Sp. T.*, 1866, *Unger v. Forty-second-street, &c. R. R. Co.*, 4 *Rob.*, 682.

FORMER ADJUDICATION, 1.

DISTURBANCE OF RELIGIOUS MEETINGS.

The provisions of article 7, title 8, ch. 20, of-part 1 of the Revised Statutes, made applicable to camp meetings. 2 *Laws of 1868*, 1758, ch. 784, § 2.

DIVORCE.

Motion in an action for limited divorce to amend the complaint by adding a claim for an absolute divorce on the ground of adultery,—denied on the ground that the causes of action were incompatible, and that, if allowed, the complaint would be demurrable. *Supreme Ct. Sp. T.*, 1864, *Hoffman v. Hoffman*, 35 *How. Pr.*, 384.

ESTOPPEL.

DOWER.

1. Where the court, in an action to recover dower, adjudges that the plaintiff is entitled to dower, it may appoint a referee, to admeasure the plaintiff's dower, and assess her damages by loss of rents and profits, instead of the three freeholders formerly required in an action at law for dower. *N. Y. Superior Ct.*, 1866, *Brown v. Brown*, 4 *Rob.*, 689.
2. Where a referee is appointed for the purpose of admeasuring and assigning dower, &c., and the defendant appears and litigates before the referee the matter referred, without appealing from the order of reference, or filing exceptions to the report, he thereby waives the right of appeal from such order of reference, and every objection except a want of jurisdiction. *Ib.*
3. On appeal, also, such error in the proceedings as admeasuring dower by one person, instead of three (required to be) freeholders, should be disregarded, as not affecting the substantial rights of the defendant. *Ib.*

EJECTMENT.

The omission of the defendant to demand the production of the authority of plaintiff's attorney, where he has nothing to put him on his guard, awaken suspicion, or to lead him to distrust the good faith of the attorney, should not affect his right to insist upon the judgment, if in his own favor, when it is not claimed that the attorney is not of sufficient responsibility to answer to the plaintiff for any costs or other damage he may have sustained. *Ct. of Appeals*, 1868, *Hamilton v. Wright*, 37 *N. Y.*, 502.

ELECTIONS.

EVIDENCE, tit. *Documentary Evidence*, 3.

ESTOPPEL.

1. Pending an action upon one of two promissory notes having the same consideration, and subject to the same defenses, and just before the statute of limitations would have barred the second note, the defendant, being informed that the plaintiff intended to sue upon the second, promised the plaintiff that if he would not do so, he would abide by the decision of the action on the first.—*Held*, that the plaintiff having acted upon this request, the defendant was estopped from setting up the statute of limitations which subsequently barred the second note. *N. Y. Superior Ct.*, 1867, *Brookman v. Metcalf*, 4 *Rob.*, 568.
2. An estoppel *in pais* may be urged against a defense of usury. *Ct. of Appeals*, 1867, *Mason v. Anthony*, 35 *How. Pr.*, 477.
3. A bond executed by the obligor to a receiver by whom the obligor was

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sued, as a condition of having leave to withdraw a demurrer to his complaint and to answer, and conditioned for the payment of any judgment which the receiver might recover in the action,—*Held*, under the circumstances in which it was given, to amount to an admission not only that the plaintiff has been duly appointed receiver, but also that he was authorized to bring the action. Hence, in the action on such bond, it was not necessary to prove the application upon which the order was made by which the receiver was originally appointed. *Supreme Ct.*, 1867, *Scott v. Duncombe*, 49 *Barb.*, 73.

4. *Held*, further, that upon such bond the plaintiff might recover the whole amount of the judgment in the action, although it included a recovery for judgments in respect to which he had not been appointed receiver at the time the bond was given. *Ib.*
5. It is not necessary, in order that a judgment in partition bind the parties on the question of the intestacy of the ancestor, or the validity of his will, that these matters should have been adjudicated in precise terms. It is sufficient that the substance was so decided. The estoppel extends beyond what appears on the face of the judgment to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings. [2 *Smith's Leading Cases*, 787; 7 *Casey*, 381.] The burden of proof is of course on those who rely upon the estoppel, and they must show that the matter now in controversy has been already heard and determined. When, however, it is made to appear with sufficient clearness that a transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible, and cannot be overcome except by the clearest proof that no evidence was given as to that fact by the plaintiff, or that the defendant failed to take advantage of a defense that might have been made available. 24 *How. Pr.*, 183; 36 *Barb.*, 88; 12 *Harris*, 242; 17 *S. & R.*, 319, 321.] *Ct. of Appeals*, 1867, *Clemens v. Clemens*, 37 *N. Y.*, 59.

EXECUTION, 6; FORMER ADJUDICATION.

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1. *Judicial Notice.*

1. Matters of public history, affecting the whole people, are judicially taken notice of by the courts; no evidence need be produced to establish them; the court, in ascertaining them, resort to such reference as may be at hand and as may be worthy of confidence. Thus the actual existence of civil war is a fact in our domestic history which the court is bound to notice and to know. [2 *Black*, 767; *Greenl.*, 56.] *Ct. of Appeals*, 1867, *Swinerton v. Columbian Ins. Co.*, 57 *N. Y.*, 174.
2. A statute which is private or local in many of its provisions, may con-

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tain a section which is of a public or general character; in which case, the courts will take judicial notice of such section. *N. Y. Superior Ct.*, 1868, *Bretz v. Mayor, &c. of N. Y.*, *Ante*, 258.

2. *Burden of Proof.*

1. When one purchases personal property of a judgment debtor, after an execution has been issued and put into the hands of the sheriff against such property, *it seems* that the *onus* is on the purchaser to show himself to be a purchaser in good faith. *Ct. of Appeals*, 1867, *Williams v. Shelly*, 37 *N. Y.*, 375.
2. In an action for injuries sustained by the falling of a rock from the bank of the defendants' canal, the burden of proof,—*Held*, to be on the plaintiff to show negligence. *N. Y. Superior Ct.*, 1866, *Weinter v. Delaware & Hudson Canal Co.*, 4 *Rob.*, 234.
3. In an action on an agreement to pay a certain portion of the profits of a joint adventure, upon condition that information furnished by the plaintiff should prove true, the burden of the proof is on the plaintiff to show that the information was true; although if there was no such expressed condition the burden would be upon the defendant to prove falsity if he relied upon that. *N. Y. Superior Ct.*, 1867, *Strong v. Place*, 4 *Rob.*, 385.
4. In an action for goods sold, where the answer sets up that defendant was to pay when she could, the burden of the proof is upon the defendant to make out the defense. *Supreme Ct.*, 1867, *Johnson v. Plowman*, 49 *Barb.*, 472.
5. Where the defendant in an action for goods sold, admits the sale and delivery alleged, but sets up payment made by transferring promissory notes accepted in satisfaction, the burden of proving payment in the manner alleged is upon the defendant. *Ct. of Appeals*, 1867, *Boswell v. Poiner*, *Ante*, 244.

3. *Parol Evidence to Explain Writings.*

1. Testimony of the writer of a letter,—how far admissible to explain its meaning. *Von Bruck v. Peyser*, 4 *Rob.*, 514.
2. A receipt attached to a bill of parcels of goods sold, acknowledging that the seller has "received payment by note," may be contradicted by parol evidence showing that the note was not accepted in satisfaction of the demand for the price. *Ct. of Appeals*, 1867, *Boswell v. Poiner*, *Ante*, 244.
3. A contract cannot be varied by parol evidence on the trial of an action upon it, although the case be such that it might be reformed upon such evidence in an equitable action for the purpose. *Supreme Ct.*, 1867, *Bush v. Tilley*, 49 *Barb.*, 599.

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4. *Opinions of Witnesses.*

1. The question who was in actual occupation of certain real property, is a question of fact; and it is proper to put this question to a witness. It is a question to be determined by ocular observation, and not by a process of reasoning. *Supreme Ct.*, 1868, *Hardenburgh v. Crary*, 50 *Barb.*, 32.
2. Where there are no actual sales of an article, a witness may give his opinion of the value of it. *Supreme Ct.*, 1867, *Simpkins v. Low*, 49 *Barb.*, 332.
3. It is competent to ask a witness in reference to his sickness, whether he was able to travel. This is not a question calling for an opinion, but is rather addressed to the conscious knowledge of the witness. *Ct. of Appeals*, 1868, *People v. Tubbs*, 37 *N. Y.*, 586.
4. The opinion of witness that most of the voters at an election in a religious corporation, were not legal voters, furnishes no evidence of their disqualification, even though the answer be given in reply to a question propounded by the court. The court has no authority to propound improper questions to a witness against the objection of counsel, and if it do, its action will be corrected on appeal. *Ct. of Appeals*, 1867, *People v. Lacoste*, 37 *N. Y.*, 192.

5. *Admissions and Confessions.*

1. It is no objection to proving admissions of a party, that they were made to the husband or wife of such party, where the marriage had been declared void by statute, or by adjudication. *Ct. of Appeals*, 1868, *Blossom v. Barrett*, 37 *N. Y.*, 434.
2. The rule that a party's admissions are not admissible unless his attention was called to time and place, is not applicable where the admission sought to be proved is that of a party to the suit. *Ct. of Appeals*, 1868, *Blossom v. Barrett*, 37 *N. Y.*, 434.
3. Admission of a servant as to a transaction, made after the transaction, and after he had ceased to be the servant of the party,—*Held*, not binding on the party. [1 *N. Y.*, 131.] *Supreme Ct.*, 1867, *Card v. N. Y. & Harlem R. R. Co.*, 50 *Barb.*, 39.
4. A confession made by a prisoner, under arrest and imprisonment on a charge of felony, is admissible in evidence against him upon his trial, if it was made without any inducement, promise, threat or menace being used to influence its being made. *Ct. of Appeals*, 1867, *People v. Wentz*, 37 *N. Y.*, 303.
5. The value and effect of confessions, as evidence in criminal cases,—considered. *People v. Bennett*, *Ante*, 89.

6. *Documentary Evidence.*

1. Judgments of the courts of the Dominion of Canada shall be only *prima facie* evidence of the debts, claims or causes of action on which such judg-

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- ments are founded ; and in any action upon any such judgment, in any of the courts of this State, the defendant or defendants therein may set up by answer and prove, upon the trial of such actions, any facts which constitute a defense or counter-claim to the debt, claim or cause of action upon which such judgment was rendered. Nothing in this act contained shall apply to judgments which have been rendered after both parties thereto have appeared in the case, and been heard and given evidence thereon. 2 *Laws of 1868*, 1232, ch. 596.
2. Depositions taken by any commissioner of emigration of the port of New York, respecting complaints of passengers, if taken on an examination in the presence of the person complained of, who has a right to cross-examine the witness, are evidence on the trial of any action between a passenger, and the ship, her owners, &c., &c. Proceedings to take such depositions regulated. 2 *Laws of 1868*, 2040, ch. 857.
 3. Under the provisions of part I., ch. 18 of the Revised Statutes,—for the election of wardens and vestrymen in the Protestant Episcopal Church in this State,—the rector is made both the presiding and returning officer, and his certificate of election furnishes presumptive evidence of the right of the party receiving it to hold the office and exercise its functions. *Ct. of Appeals*, 1867, *People v. Lacoste*, 37 *N. Y.*, 192.
 4. In an action in the nature of a *quo warranto*, brought against persons so elected, according to the certificate of the rector, it is incumbent on those contesting their election to establish by affirmative evidence that, at the election, themselves, instead of the defendants, were duly elected. *Ib.*
 5. An inventory of a stock of goods, written on the leaves of a bound book, from which they have been torn, if complete in itself, is admissible in evidence, without the production of such book, where there is no evidence to show that it contained anything besides the inventory. *N. Y. Superior Ct.*, 1866, *McCluskey v. Falke*, 4 *Rob.*, 87.
 6. A receipt given to a carrier by another carrier, on receiving goods to forward, and without examination of the goods, but describing the packages shipped as in good order on such reshipment, furnishes no evidence of the condition of the goods at that time, in an action by the owner against the carrier first mentioned. *Ct. of Appeals*, 1867, *Hunt v. Michigan S. & N. Indiana R. R. Co.*, 37 *N. Y.*, 162.
 7. A partnership agreement, certified to have been proved before a notary public,—*Held*, admissible in evidence. *N. Y. Superior Ct.*, 1866, *Mattison v. Demarest*, 4 *Rob.*, 161.
 8. Although a witness cannot read from a memorandum as testimony, even when it was made by himself, yet if his testimony in reference to the memorandum referred to when giving his testimony may be understood as showing that he recollects the facts, and testifies to them as from his recollection, his memorandum is admissible. *Supreme Ct.*, 1867, *Wilde v. Hexter*, 50 *Barb.*, 448.
 9. Upon the second trial of an action, the plaintiff called one of the counsel of the defendant, to prove the testimony given by a witness on a former trial, he having since that trial died. He testified, that he was one of the counsel for defendant in this action, was present at the former trial, and

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- took notes of testimony; he had them there in court. He said: "So far as I took minutes, I took them as given by the witness, so far as I could; I designed to take the substance of the testimony as given by the witness, so far as I could; I designed to take the substance of the testimony as given by the witness, and presume from that I have; I have no recollection of the testimony aside from what I have here." On his cross-examination he said: "Should judge that it was not possible for me to take the whole testimony *verbatim*; did not aim to take more than the substance; do not say that I have the whole language of the witness, nor the whole of his testimony." In response to the court, the witness said: "I have no recollection of the witness or of the testimony; not the slightest whatever; I have his testimony on my minutes, and presume it is the substance of his testimony." The court overruled the defendant's objection, and admitted the evidence.—*Held*, that there was no error in admission of the testimony. *Ct. of Appeals*, 1867, *McIntyre v. Central R. R. Co.*, 37 *N. Y.*, 287.
10. A case prepared on an appeal in a former trial of the action, not evidence against the plaintiff of what took place on the trial, although it was drawn up in his own handwriting. [1 *Johns.*, 301.] *N. Y. Superior Ct.*, 1868, *Wheeler v. Ruckman*, 35 *How. Pr.*, 350.

7. *Particular Facts and Issues.*

1. In an action brought against a purchaser of government securities payable to bearer, by one from whom they had been previously stolen, evidence explaining that the defendants purchased without regard to notices of theft and loss sent them, because the magnitude of their business and the number of such notices were such that it would be impracticable to deal in such securities if they were bound to examine such notices,—is admissible. *N. Y. Common Pleas*, 1868, *Seybell v. National Currency Bank*, *Ante*, 352.
2. Negligence, though gross, is not enough of itself to charge the purchasers of stolen paper which is negotiable by delivery. There must be want of good faith. *Ib.*
3. What is sufficient evidence to support an action founded on an alleged use of a secret process which the defendant had covenanted not to divulge or use. *Nessle v. Reese*, 49 *Barb.*, 374.
4. Fraud, in a conveyance, will not be inferred from the want of consideration; but the burden of proving the intent is upon the creditor who impeaches the conveyance. *N. Y. Superior Ct.*, 1868, *Loeschig v. Addison*, *Ante*, 210.
5. Although a letter be addressed to a single member of a firm, yet if, when read in the light of attendant circumstances, it appears to have been intended to authorize an act of the firm, it will be sufficient to confer authority upon the firm. *Ct. of Appeals*, 1867, *Barney v. Worthington*, *Ante*, 205.

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6. Proof of the attendant circumstances is admissible to explain the letter. *Ib.*
7. Possession of leased premises, the property of the plaintiff, in an action for use and occupation, is sufficient evidence of an assignment of them by the original lessee to the defendant, to enable the owner to recover against the defendant directly. *N. Y. Superior Ct.*, 1868, *Coit v. Planer*, *Ante*, 140.
8. An action for damages for the conversion of money of the plaintiff to the defendant's own use, may be sustained without proving the specific description of the bills or coin converted. Proof of defendant's admission of the conversion and the amount taken, may be sufficient. *Ct. of Appeals*, 1867, *Gordon v. Hostetter*, *Ante*, 263 ; *S. C.*, 37 *N. Y.*, 99.
9. Mode of proving the value of a stock of goods in an action on a policy of fire insurance. *De Groot v. Fulton Fire Ins. Co.*, 4 *Rob.*, 504.
10. Circumstantial evidence of a mistake in the amount of a payment,—*Held*, sufficient to sustain a verdict, although there was positive evidence to the contrary. *N. Y. Superior Ct.*, 1866, *Metropolitan Bank v. Smith*, 4 *Rob.*, 229.
11. An assignment for the benefit of creditors not to be held invalid merely upon the testimony of the assignor as to his intent in making it. *Supreme Ct. Sp. T.*, 1867, *Work v. Ellis*, 50 *Barb.*, 512.
12. In an action where the question of the anticipated profits which plaintiff lost by the breach of a contract, is involved, evidence of the expense which he would necessarily incur, is admissible in reduction of such profits. *Supreme Ct.*, 1867, *Giles v. Morrison*, 50 *Barb.*, 50.
13. In an action by a seller of goods to recover them back from the possession of the defendant on the ground that the buyer, under whom defendant claimed, procured the sale, on credit, by fraudulent representations, the plaintiff may prove the fraudulent intent not to pay, either by proof of direct statements shown to be untrue, or by proof of circumstances tending to the same result. *Ct. of Appeals*, 1867, *Van Kleeck v. Le Roy*, 4 *Ante*, 431.
14. A direct misrepresentation to the plaintiff having been proved, it is competent to prove similar fraudulent representations made to another person in a different transaction, as bearing upon the question of intent. *Ib.*
15. Such similar frauds, however, are not *alone* sufficient to sustain a recovery, even if it be shown that the representations were communicated to the plaintiff, and that he acted on the faith of them, unless it be also shown that the buyer, in making such representations, intended them to be so communicated. *Ib.*
16. Rules applicable in prosecutions under the act for the preservation of game. 2 *Laws of 1868*, 1765, ch. 785, § 22.
17. In an action on behalf of the next of kin to recover damages for death caused by the defendant, the question, "What did the deceased usually earn?" is proper, as being an inquiry of importance in forming an estimate

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- of the pecuniary loss sustained by the next of kin. *Ct. of Appeals*, 1867, *McIntyre v. N. Y. Central R. R. Co.*, 37 *N. Y.*, 287.
18. Proof of the casual use of the defendants' vessel in transporting plaintiff's property,—*Held*, not sufficient to prove the defendants to be common carriers. *Ct. of Appeals*, 1867, *Allen v. Sackrider*, 37 *N. Y.*, 341.
19. Rules of evidence applicable to the presumption of malice and to the doctrine of privileged communications in the case of mercantile agencies. *Ormsby v. Douglass*, 37 *N. Y.*, 477.
20. Evidence of skepticism of the deceased not admissible on the question whether his death was by suicide. *Ct. of Appeals*, 1868, *Gibson v. American Mutual Life Ins. Co.*, 37 *N. Y.*, 580.
21. Usage, that a broker buying stocks need not preserve for delivery the identical stocks purchased, and that in default of his principal's reimbursing him, he may sell without notice,—not admissible. *N. Y. Superior Ct.*, 1867, *Taylor v. Ketchum*, 35 *How. Pr.*, 289.
- DEPOSITIONS; DISCOVERY, 2; ESTOPPEL; EXAMINATION OF PARTIES; FORMER ADJUDICATION; TRIAL; WITNESS.

EXAMINATION OF PARTIES.

1. As a general rule, an issue must have been joined, before a party to an action can procure an examination of an adverse party. *Supreme Ct.*, 1868, *Bell v. Richmond*, *Ante*, 44.
2. The proper practice to obtain the examination of an adverse party stated as follows:—
 1. On an application, under the provisions of the Code, by a *party*, for the examination of the adverse party as a witness in the action, he must present an affidavit stating, 1st. The nature of the action and the plaintiff's demand. 2nd. If the application be made by the defendant, then the nature of his defense; and 3rd. The name and residence of the proposed witness.
 2. Upon that affidavit the party may apply for such an order as is mentioned in section 3 of the statute in relation to the conditional examination of witnesses within this State (2 *Rev. Stat.*, 392), and also for the summons provided for in section 10 of the same statute.
 3. The order so obtained should be served upon the attorneys of all the parties who have appeared, or, if the time for appearance has not yet expired, then upon the adverse parties themselves, who have not appeared; and the summons should also be served upon the proposed witness.
 4. In case the proposed witness fails to appear, the party who has procured the order and summons may, upon a proper affidavit, obtain a warrant directing the sheriff to apprehend such witness, and bring him before the judge (2 *Rev. Stat.*, 401, § 60); or, at his option, he may, on a proper affidavit and notice, have an order directing the pleading of the

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recusant witness to be stricken out. [Code, § 394.] *N. Y. Superior Ct.*, 1865, *Greene v. Herder*, 4 *Rob.*, 655.

3. Where a party required to attend and testify before trial, in order to enable the adverse party properly to prepare for the trial, under sections 391-4 of the Code of Procedure, refuses to attend, the court cannot, upon such refusal, stay the party's proceedings until he shall attend, but is confined to the remedy given by section 394,—viz: to punish as for a contempt, and strike out his pleadings. *Supreme Ct.*, 1867, *Appleton v. Appleton*, 50 *Barb.*, 486.
4. If the party whose testimony is desired is out of the State, the party desiring the testimony must proceed, under section 390, for an examination by commission. A proceeding under section 391, by summons and notice to attend in court, is ineffectual. *Ib.*

EXCEPTIONS.

1. An exception does not lie to the report of a referee, upon the ground that he has refused to find upon a question of fact other than the issues in the cause. *Ct. of Appeals*, 1867, *Wiltie v. Eadie*, *Ante*, 393.
2. Exceptions to a referee's findings of fact are of no avail. The decision of a referee is always open to review upon the facts, in the supreme court, without any exception. The court will always look into the evidence, if the question is raised, so far as to see whether there is evidence tending to prove the facts, or either of them, as found by the referee; and no exception is necessary to raise the question. An exception to a referee's conclusions of law, and to each and every part thereof, is so general as scarcely to raise any questions of law whatever. At most, it can only raise the question whether any of the conclusions of law are justified by the facts found. *Supreme Ct.*, 1868, *Lefler v. Field*, 50 *Barb.*, 407.
3. Upon a trial by the court without a jury, an exception cannot be taken to an omission of the court to find upon facts requested to be found, or a refusal to find upon them, until after a decision has been drawn up by the court, as provided by the Code. The 268th section of the Code alone provides for taking exceptions *after* the decision is made, and they must be written and filed, not taken orally. *N. Y. Superior Ct.*, 1867, *McKeon v. See*, 4 *Rob.*, 449.
4. That where the answer to a question is not responsive, the question to be considered on exception is independent of the answer given. *Ct. of Appeals*, 1867, *Brouwer v. Frauenthal*, 37 *N. Y.*, 166.

EXECUTION.

1. An execution is to be regarded as regularly issued, although the docket of judgment had been marked "satisfied" by the clerk before it was issued, upon filing of a satisfaction-piece, which, although duly executed by the judgment creditor, was never duly delivered to the defendant, so that

EXECUTORS AND ADMINISTRATORS.

- the docket of the sheriff was improperly canceled. [7 Wend., 35.] *N. Y. Superior Ct. Sp. T.*, 1865, *Anderson v. Nicholas*, 4 *Rob.*, 630.
2. The more proper practice, however, would be to move to cancel the satisfaction before issuing execution. *Ib.*
 3. The provisions of law exempting certain property from seizure and sale upon execution, extend to property owned by the debtor as a member of a partnership. If the partners have such an ownership as subjects the property to seizure on execution, they have also such an ownership as entitles them to claim its exemption, in a case plainly falling within the terms and intent of the statute. *Ct. of Appeals*, 1867, *Stewart v. Brown*, 37 *N. Y.*, 350.
 4. Under the provision exempting from levy and sale "the necessary team of any person being a householder," &c., the interest of one of two persons owning jointly a team used for the common support of both, the debtor being a householder, &c., is exempt. *Ib.*
 5. That under process against some of the partners levied on partnership property the sheriff is not a trespasser in selling in small parcels and delivering the property to purchasers, provided he sells only the interest of the partners whose shares are bound by the process. *N. Y. Superior Ct.*, 1866, *Berry v. Kelly*, 4 *Rob.*, 106.
 6. A mortgagee of chattels, who, on their being seized on execution against the mortgagor, obtains a postponement of the sale by stipulating with the sheriff that he will take care of the goods, and produce them at the day of sale, and will not meantime interfere with them by virtue of his mortgage, is not thereby estopped from suing the sheriff for seizing and selling the goods. *Ct. of Appeals*, 1868, *Russell v. Winne*, *Ante*, 383.
 7. Under 2 *Rev. Stat.*, 390, section 42,—requiring the sheriff's certificate of sale to contain a description of the premises, price bid, the consideration paid, and the day when the purchaser will be entitled to the conveyance, and declaring the certificate presumptive evidence of the facts therein contained,—a certificate is not evidence of facts other than those *required* to be therein contained, and the recital in the certificate of the execution is not evidence of an execution. A party claiming a title to the real property so sold must prove the execution and the judgment in addition to the certificate. *N. Y. Superior Ct.*, 1866, *Anderson v. James*, 4 *Rob.*, 35.
 8. County clerk of Niagara county to record certain certificates of sale of real estate as heretofore filed, and the certified copy thereof to be evidence. 2 *Laws of 1868*, 1206, ch. 586.

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1. Under the provisions of 3 *Rev. Stat.*, 5th ed., 175, section 41,—that if an executor or administrator doubt the justice of any claim presented to him, he may enter into an agreement in writing with the claimant to refer the matter to one or three referees, to be approved by the surrogate; and

FORECLOSURE.

upon filing such agreement and approval with the clerk of the supreme court, a rule shall be entered by the clerk, referring the matter to the persons so selected,—an order signed by the surrogate reciting the presentation of the claim, and that the parties were agreed on a reference, with a consent to the order signed by the attorneys on behalf of the parties, amounts to an agreement in writing to refer; and is sufficient under the statute. To confer jurisdiction under the statute a substantial compliance with its terms is enough. *Supreme Ct.*, 1868, *Bucklin v. Chapin*, 35 *How. Pr.*, 155.

2. The naming of the referees in the order is a sufficient evidence of their approval by the surrogate. *Ib.*
3. The filing of such an order with one of the clerks of the supreme court is a sufficient entry of the rule under the statute, and it is no objection that the order was entitled in the surrogate's court. *Ib.*
4. If the order were not filed or entered, this defect may be supplied *nunc pro tunc* to sustain the judgment on the referee's report, against an appeal therefrom. *Ib.*
5. Section 37 of the act of 1837, as to proof of debts, &c., &c.,—is amended by adding thereto the following words: "But the statute of limitations shall not be available as a defense to such debt or claim, provided the same shall be presented and claimed at the first accounting, and provided the same was not barred by statute, at the time of the death of the testator or intestate." 2 *Laws of 1868*, 1231, ch. 594.
6. Where an executor has received a portion of the estate, and sold the same, and applied the money arising from the sale to his business, thereby commingling it with his own property, and preserving no evidence by which the trust fund can be identified; in the distribution of the assets of such executor, after his death, by the surrogate, no preference can be allowed in favor of the trust estate on account of such moneys, but the estate must stand on a footing with the other creditors of the executor. [2 *Edw. Ch.*, 80; 10 *Johns.*, 63; 17 *Abb. Pr.*, 152.] When the identity of the trust fund is preserved, so that it can be traced, it will be protected; but when the trustee is allowed to absorb the same in his business, it ceases to be sacred, and loses all preference. *Supreme Ct.*, 1867, *Barlow v. Yeomans*, 50 *Barb.*, 187.

FILING.

ATTACHMENT, 2; CHATTEL MORTGAGE; EXECUTORS AND ADMINISTRATORS, 3.

FORECLOSURE.

1. A married woman during her infancy took a deed of land by which she assured the payment of a mortgage thereon,—*Held*, that she might be held liable for a deficiency on a foreclosure thereof, she having subsequently conveyed the premises with warranty, and appeared on a foreclosure suit,

FOREIGN CORPORATIONS.

- without interposing the defense of infancy. *Supreme Ct. Sp. T.*, 1868, *Flynn v. Powers*, 35 *How. Pr.*, 279.
2. On trial of an action to foreclose a mortgage, brought under a clause providing that when interest has remained in arrear for thirty days, the whole principal sum shall, at the opinion of the mortgagee, &c., become due and payable, the mere production of the bond and mortgage is sufficient,—the thirty days appearing to have elapsed since a day named in the mortgage for a payment of interest, to entitle the plaintiff to a decree. *N. Y. Superior Ct.*, 1868, *Sowarby v. Russell*, *Ante*, 238.
 3. It is not necessary for the plaintiff to prove that the interest has not been paid. *Ib.*
 4. Surplus moneys arising on foreclosure, under advertisement, are subject to the jurisdiction and order of the supreme court. 2 *Laws of* 1868, 1805, ch. 804, § 1.
 5. Attorneys or others receiving such surplus may pay it to the county clerk within ten days. 2 *Laws of* 1868, 1805, ch. 804, § 2.
 6. Parties having a lien or an interest in the premises at the time of sale may, within twenty days after sale, file, in the county clerk's office, a notice of claim to such moneys, and thereafter, on notice to others concerned, apply to the court at special term, for an order of reference. Proceedings thereon regulated. *Id.*, § 3.
 7. In an action by the owners of land against the officers of a municipal corporation for trespassing thereon in the construction of local improvements, the fact that the municipal corporation may have had an interest in the premises under a mortgage which had been foreclosed without notice to them,—*Held*, no defense; because the plaintiff was to be regarded as a mortgagee in possession, and entitled to possession as against the defendant. *Supreme Ct.*, 1867, *McMannis v. Butler*, 49 *Barb.*, 176.

FORMER ADJUDICATION, 10.

FOREIGN CORPORATIONS.

1. The supreme court of this State has jurisdiction of an action brought by a citizen of this State against a foreign corporation in which he is a stockholder, to restrain illegal acts of the directors, when they are personally within the jurisdiction of the court. *Supreme Ct. Sp. T.*, 1868, *Fisk v. Chicago, &c. R. R. Co.*, *Ante*, 378.
2. The acts, *ultra vires*, of a foreign corporation, which is a creature of the laws of two different States, are not made valid by a confirmatory statute enacted by the legislature in one only of such States. *Ib.*
3. By 2 *Rev. Stat.*, 459, section 150, amended by the act of March 15, 1849 (*Laws of* 1849, 142),—allowing actions against a foreign corporation for the recovery of debt or damages “arising upon contract made, executed or delivered within this State, or upon any cause of action arising therein,”—an action lies by a non-resident against a foreign corporation, to recover damages for the loss of plaintiff's baggage by the defendant, although the

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- loss occurred in another State, if the contract of passage was made in this State. *Supreme Ct.*, 1867, *Jones v. Norwich & N. Y. Transportation Co.* 50 *Barb.*, 193.
4. The act of 1849 was not repealed by the provisions of the Code of Procedure,—which are to be regarded as extending the jurisdiction against foreign corporations, and not as superseding this act. *Ib.*
 5. A national bank, organized under the act of Congress, is a foreign corporation within the meaning of our statutes. By the Code a foreign corporation is defined to be a corporation created by or under the laws of any other State, government, or country. [Code of Pro., § 227.] The word "other," as there used, means any other State or government than that of this State. *Supreme Ct. Sp. T.*, 1867, *Cooke v. State National Bank of Boston*, 50 *Barb.*, 339.
 6. An act to amend the law of proceedings against the Grand Trunk Railway Co. of Canada, a foreign corporation, in courts of law. 2 *Laws of 1868*, 1690, ch. 752.
 7. In an action drawing in question the powers of a foreign corporation, the powers are to be determined by the law of the States by which the corporation was created, and acts are to be deemed by the courts of this State as valid which are so by such foreign law, though they would be held without the power of the corporation by our law. *Supreme Ct. Sp. T.*, 1868, *O'Brien v. Chicago, &c. R. R. Co.*, *Ante*, 381.

FORMER ADJUDICATION.

1. That a judgment dismissing the complaint, though without a trial of the issues or a verdict of the jury, is a bar to a subsequent action. *N. Y. Superior Ct.*, 1868, *Wheeler v. Ruckman*, 35 *How. Pr.*, 350.
2. The rule that a former adjudication is a bar to all matters which might have been tried under the issue, is applicable, notwithstanding that it appears by the record that such matters were not tried, but the judgment on them was taken by default on the plaintiff's evidence. *Supreme Ct.*, 1868, *Foster v. Milliner*, 50 *Barb.*, 385.
3. A judgment against a sheriff in an action by A. for levying on his property, under an execution against B., is no bar to an action by B. against A. to recover possession of the same property as owner thereof. It makes no difference that B. was a witness for the sheriff in the former action. He not being a party to the record, nor in legal privity with the party, nor having any right to control the proceedings or appeal from the judgment, he cannot be regarded as estopped from bringing an action to assert his own title. *Supreme Ct.*, 1868, *Yorks v. Steele*, 50 *Barb.*, 397.
4. Where one contract contains several covenants, an action for breach of one is not necessarily a bar to subsequent action for the breach of another, although the two relate in part to the same subject-matter. *So held*, of the covenants in a lease, to build a certain fence, and to keep the buildings

FORMER ADJUDICATION.

- and fences in repair. *Supreme Ct.*, 1867, *McIntosh v. Lown*, 49 *Barb.*, 550.
5. In order to preclude a second action for items which might have been embraced in a former action, the true question is not, whether allowing separate actions to be maintained for separate items would lead to a multiplicity of suits or would operate oppressively, but whether the former action was for the identical cause or demand for which the subsequent one was brought. [16 *N. Y.*, 548; 14 *Pick.*, 409.] *Ib.*
 6. Where the plaintiff had, in a former action, recovered damages of the defendant for injuries to his land caused by flooding the same, by means not necessarily permanent, the same causes continuing, and the same damages accruing to plaintiff as a result; in a subsequent action to recover for subsequent damages, the defendant will be estopped from denying damages as a result from the continuing cause of such damage. [19 *N. Y.*, 108.] As a matter of law, a former recovery for injuries sustained by the plaintiff, from the same cause, established the right of the plaintiff to recover damages subsequently sustained from same cause. *Ct. of Appeals*, 1868, *Plate v. N. Y. Central R. R. Co.*, 37 *N. Y.*, 472.
 9. That the existence of a judgment of dispossession affirmed on *certiorari*, and executed, may be regarded as negating the probability of any claim being made by the person so dispossessed to rent from the occupants. *Supreme Ct.*, 1867, *Kelsey v. Murray*, 49 *Barb.*, 231.
 8. The principles that a judgment in partition is binding upon the parties, if the court had jurisdiction of them and of the subject-matter of the action; and also that the supreme court is one of general jurisdiction in law and equity, and has jurisdiction of all actions for partition; that it was its province to decide whether it is proper in any given case to award a partition or a sale, and if its decision be erroneous the remedy was by an appeal;—applied to preclude objections to the title under a decree and sale in partition. *Ct. of Appeals*, 1867, *Clemens v. Clemens*, 37 *N. Y.*, 59.
 9. A cause of action may be withdrawn at or before the trial, and so may a distinct matter of defense, which is not necessarily a part of the plaintiff's case to overcome, in order to make out his right to recover. And as to matters so waived or withdrawn, the trial and judgment are no bar. [2 *John.*, 227; 6 *Term R.*, 607; 3 *Wils.*, 304; 2 *John.*, 210; 13 *Id.*, 227.] *Supreme Ct.*, 1868, *Foster v. Milliner*, 50 *Barb.*, 385.
 10. Subsequent incumbrancers, who are made parties to a foreclosure under the usual allegation of their claiming a subsequent lien, must assert their claims at the peril of being foreclosed in respect to them; and by a judgment of foreclosure in such an action they are bound. It makes no difference that they were joined as judgment creditors while in reality they were also creditors by mortgage. *Supreme Ct.*, 1867, *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 *Barb.*, 441.

ESTOPPEL; JUDGMENT.

HIGHWAYS.

FORMS.

1. Proper form of an affidavit to obtain an order of arrest in an action for the purchase of goods upon credit obtained by fraudulent representations. *Greene v. Herder*, 4 *Rob.*, 655.
2. Form of an answer in an action upon an award setting up misconduct of arbitrators and mistake in computation. *Garvey v. Carey*, 35 *How. Pr.*, 282.
3. Form of an indictment for murder by shooting. *Ct. of Appeals*, 1868, *Fitzgerrold v. People*, *Ante*, 68.

FRAUDULENT CONVEYANCES.

1. A voluntary conveyance is not void, as against *subsequent* creditors, unless it was made with *actual intent* to defraud. *N. Y. Superior Ct.*, 1868, *Loeschigk v. Addison*, *Ante*, 210.
2. An agreement by the mortgagee of chattels, in favor of the mortgagor, that the latter may sell for his own benefit, and as his own, portions of the property covered by the mortgage, renders the mortgage fraudulent and void ; and it should be so pronounced by the court, without submitting the question of intent to the jury. The rule is the same, whether such agreement be contained in the mortgage, or is evidenced by the acts of the parties.—*Per GROVER, J. Ct. of Appeals*, 1868, *Russell v. Winne*, *Ante*, 383.
3. A chattel mortgage which is fraudulent as to creditors by reason of such an agreement as to part of the property, is void as to all the property embraced in it. *Ib.*

HIGHWAYS.

1. A petition for the laying out of a public highway may lawfully include a portion of a highway already in existence, and the new highway may, for a portion of its distance, be laid out upon, and be identical with, an existing highway. It is a question of discretion and convenience to be determined by the commissioners or referees. *Ct. of Appeals*, 1867, *People v. Commissioners, &c.*, 37 *N. Y.*, 360.
2. A description of a portion of the new highway, by reference to an established highway, is a description by "metes and bounds," and is within the requirements of 1. *Rev. Stat.*, 415, § 63,—by which the commissioners are required, if they determine to lay out a highway, "to make out and subscribe a certificate of such determination, describing the road so laid out particularly, by metes and bounds and by its courses and distance, and to deposit the same with the town clerk." *Ib.*
3. No private or public road to be laid out through a burying ground unless the remains are first removed. 2 *Laws of 1868*, 1996, ch. 843.
5. Upon an appeal from the decision of a commissioner as to the laying out

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of a highway, evidence that the certificate of freeholders as to its necessity was obtained by fraudulent representations, is not admissible. This objection does not go to the jurisdiction of the commissioners. It is to be raised by a direct proceeding to review the decision, and not by proof before the referees on an appeal. [Reviewing authorities.] *Supreme Ct.*, 1867, *People v. Kniskern*, 50 *Barb.*, 87.

5. On separate appeals from the decisions of different commissioners in highway cases, the court may, by one and the same order, appoint the same referees to hear and decide both appeals. *Supreme Ct.*, 1867, *People v. Kniskern*, 50 *Barb.*, 87.
6. Where referees appointed on an appeal from the decision of commissioners, give timely notice to the owners and occupants of the land that they will meet on a specified day to decide upon the application to lay out the highway, it is not necessary, upon their subsequent determination therein to lay out such highway, to serve an additional notice on the owners and occupants. Such notice, although it precedes the taking of the testimony, and the reversing of the order of the commissioners appealed from, satisfies the statute. *Supreme Ct.*, 1867, *People v. Kniskern*, 50 *Barb.*, 87.

ISSUES.

In an action for the foreclosure of a mortgage, the defendant set up that it was held as security for a usurious note, and on the trial of issues framed for the purpose, it appeared that the usurious note was a renewal note, given to pay the original note, which was not usurious.—*Held*, that it was proper for the court to submit to the jury additional issues for the purpose of presenting these facts, and on proof that the original note was not usurious, to give judgment for the plaintiff. *Ct. of Appeals*, 1867, *Farmers & Mechanics' Bank v. Joslyn*, 37 *N. Y.*, 353.

IMPRISONMENT.

On a motion to discharge the defendant from imprisonment, for the neglect of the plaintiffs to charge him in execution within three months after having been surrendered by his bill, the plaintiff's ignorance that he had been surrendered, is sufficient "good cause to the contrary," in opposition to the application; but the plaintiff may be required to issue execution within a limited time, or submit to the *supersedeas*. *N. Y. Superior Ct. Sp. T.*, 1865, *Desisles v. Cline*, 4 *Rob.*, 645.

INDICTMENT.

1. A common law indictment for murder, charging a willful and felonious killing with malice aforethought, is sufficient within the statute defining murder in the first degree, and a general verdict on such an indictment.

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- ment sustains a conviction for murder in the first degree. [Citing authorities.] *Supreme Ct.*, 1867, *Fitzgerrold v. People*, 49 *Barb.*, 122.
2. An indictment which alleges that the prisoner "willfully, maliciously, and of malice aforethought," shot the deceased, inflicting a wound from which the deceased died, is sufficient, as respects the averment of intent, to amount to a charge of murder in the first degree. *Ct. of Appeals*, 1868, *Fitzgerrold v. People*, *Ante*, 68.
 3. A general verdict of guilty, under such an indictment, will sustain a sentence of death. *Ib.*
 4. In an indictment for larceny of goods purchased for the use of a county poorhouse, and taken by the defendant from the premises of such poorhouse, it is proper to describe the goods as the property of the county. *Ct. of Appeals*, 1867, *People v. Bennett*, *Ante*, 89.
 5. In what cases the property in goods stolen may be laid, in the indictment, in a servant having mere actual custody of them at the time of the theft. *Ib.*
 6. Although public officers, such as a board of supervisors, in examining, settling and allowing accounts chargeable to the county, act judicially, and are not liable in a civil action for a wrongful determination, they are liable to indictment for willfully and fraudulently exceeding their powers. Hence, an indictment lies against a supervisor for corruptly voting that the account presented be allowed as against the county. *Supreme Ct.*, 1866, *People v. Stocking*, 50 *Barb.*, 573.
 7. Although, where a board of supervisors exceed their jurisdiction, their act is not binding on the parties intended to be affected thereby, the excess of jurisdiction is no defense to one of their number against an indictment for corruption in voting upon the subject. *Ib.*
 8. The rule that indictment will be considered good, notwithstanding omissions in it, if the omissions complained of are, in common understanding, implied in that which is expressed,—approved and applied. *Ct. of Appeals*, 1867, *People v. Bennett*, *Ante*, 89.
 9. It is not necessary that an indictment should formally state that it was found by a *grand jury*; or by the legal *number* of grand jurors; or that they were *sworn*. These things may be implied from an indictment commencing "The jurors of the people of the State of New York, in and for the body of the county of ———, upon their oaths present;" for only a grand jury, legally constituted, has power to present an indictment. *Ib.*
 10. The distinction between the *caption* and the *commencement* of an indictment,—stated. *Ib.*

INJUNCTION.

1. Under the provision of the *Laws of 1867*, 2410, section 9,—which declares that "no preliminary injunction shall be granted against the Metropolitan Board of Health, or of police, or its or their officers, or against the commissioners of said board, in their capacity as a board of excise, or

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- against the last named board, except by the supreme court, at a special or general term thereof, after service of at least eight days' notice of a motion for such injunction, together with copies of the papers on which the motion for such injunction is to be made,—the New York superior court is precluded from granting any injunction against the commissioners of police. The act is not obnoxious to the objection of unconstitutionality. *N. Y. Superior Ct. Sp. T.*, 1867, *Burnham v. Acton*, *Ante*, 1.
2. An injunction forbidding the Metropolitan Board of Health to enforce an order suspending the business of the plaintiff as a nuisance,—refused. *Reynolds v. Schultz*, 4 *Rob.*, 282.
 3. An injunction not to be granted against the proceedings of a board of officers, unless it be shown that damage would result from their official action. *Supreme Ct. Sp. T.*, 1867, *Sherwood v. Connolly*, 35 *How. Pr.*, 124.
 4. Where officers exercising an office are in under color of right, deputies or subordinates appointed by adverse claimants of the office, cannot maintain an action for an injunction against the comptroller, to restrain the payment of salaries to the deputies and subordinates appointed by the officers in possession of the office. The title of the principals cannot be determined in such an action, and the comptroller will be justified in paying salaries to the appointees of the officers in possession, until he is restrained from doing so, in an action properly instituted in the name of the people, to determine the title to the office. *Supreme Ct. Chambers*, 1867, *Mott v. Connolly*, 50 *Barb.*, 516.
 5. The equity powers of the supreme court cannot be successfully invoked to stay or prevent the assessment or collection of a tax. [Citing many authorities.] *Supreme Ct.*, 1867, *Messeck v. Board of Supervisors of Columbia County*, 50 *Barb.*, 190.
 6. Although the supreme court ought not to grant an injunction to stay the prosecution of an action pending and undetermined in a court competent to give full relief,—yet after judgment in such an action it may in a proper case sustain an action to impeach such judgment and restrain its enforcement. *Supreme Ct. Sp. T.*, 1868, *Moser v. Polhamus*, *Ante*, 442.
 7. But the fraud relied on as the ground for such relief must not only be plain and palpable, but the evidence by which it is to be proven must be clear, positive, and entirely credible. *Ib.*
 8. An injunction should be dissolved, upon a motion either to continue or to dissolve it, if upon all the evidence then disclosed, the court would not have granted it in the first instance. *Ib.*
 9. One judge of the supreme court should not grant an order of injunction in an action staying proceedings in another action pending in the same court. The doctrine of the equitable power of the court of chancery to restrain proceedings in other courts, is not to be applied to enjoin proceedings in the court of equity itself. *Supreme Ct.*, 1868, *Schell v. Erie R. R. Co.*, *Ante*, 287.
 10. An injunction to restrain the prosecution of summary proceedings to dis-

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- possess a tenant, can only be granted in favor of the tenant, or of some one who is a party to the proceedings to be enjoined. *N. Y. Superior Ct. Sp. T.*, 1868, *Aaron v. Baum*, *Ante*, 65.
11. Such injunction will not be granted to one not a party to the summary proceedings, merely because his rightful possession is to be disturbed. *Ib.*
 12. Where, in an action brought in the supreme court in one district to restrain proceedings in an action already pending in the supreme court in another district, an injunction-order restraining such proceedings is obtained, it is void, and may be disregarded. *Supreme Ct.*, 1868, *Schell v. Erie R. R. Co.*, *Ante*, 287.
 13. If, in an action brought to restrain the publication of defendant's newspaper, upon the ground he is infringing trademarks adopted by the plaintiff in the publication of a newspaper previously established, it appears that the names of the two papers are so far different, that, considering the dissimilarity of type and general appearance, one is not liable to be mistaken for the other, no injunction can be granted. *N. Y. Superior Ct. Sp. T.*, 1868, *Stevens v. De Conto*, *Ante*, 47.
 14. An injunction may be granted to restrain an adjoining owner from jarring plaintiff's building by machinery, although were the injury continued the plaintiff might have actions for damages. *N. Y. Superior Ct.*, 1867, *McKeon v. See*, 4 *Rob.*, 449.
 15. In such a case, however, the injunction should not prohibit absolutely the use of steam in defendant's building, but merely an improper use to the injury of the plaintiff. *Ib.*
 16. A person who forms a new composition, and invents a new word to characterize it, is entitled to be protected in the exclusive use of such word as his trademark; and an injunction will issue to restrain others from employing it to designate a similar article. *N. Y. Com. Pl. Sp. T.*, 1867, *Caswell v. Davis*, *Ante*, 6.
 17. The fact that the word thus claimed as a trademark, is compounded of two or more words whose meaning was previously well known, will not necessarily defeat the right to an injunction, if the compound word is new. *Ib.*
 18. An injunction against the directors of a corporation, who are charged with issuing illegal stock in excess of the actual capital, should not extend beyond the transaction in question, and enjoin dealings in the genuine stock, unless special necessity for such interference be shown. *Supreme Ct.*, 1868, *Fisk v. Chicago, &c. R. R. Co.*, *Ante*, 378.
 19. The business of a corporation not to be suspended on a mere motion, on *ex-parte* evidence, for a receiver and injunction, unless it appears beyond the possibility of doubt that the relief prayed for must finally be granted. *Supreme Ct. Sp. T.*, 1867, *Waterbury v. Merchants' Union Express Co.*, 50 *Barb.*, 157.
 20. In a suit for an injunction to restrain the officers of a voluntary incorporated association from carrying into effect a resolution or vote suspending

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the plaintiff from membership, the only question which can arise is, whether the plaintiff was suspended in accordance with the constitution and by-laws of the association. Unless they were violated by the proceedings against him, he has no ground of complaint. Those who become members of such associations are bound by their rules, not being in conflict with the law of the land; and the courts can interfere no further than to hold the association to a fair and honest administration of those rules. *N. Y. Com. Pl.*, 1868, *White v. Brownell*, *Ante*, 162.

21. Where the owner of a tract of land and dwelling, with a long-used way from the dwelling to the public highway, sells the interior part of the land, with the dwelling, although the purchaser does not acquire a right of way by prescription because the vendor cannot be said to have had an easement in his own land, he has a right of way by necessity over the remaining land, whether owned by the vendor or sold by him to third persons; and a court of equity will interpose by injunction to protect this right so far as the strict necessity continues. *N. Y. Com. Pl. Sp. T.*, 1867, *Wheeler v. Gilsey*, 35 *How. Pr.*, 139.
22. Under the Code of Procedure the courts of this State have no authority to grant an injunction to a *defendant*, except, perhaps, as a condition to some relief given to the plaintiff. We must look to the Code for all the power which the courts possess, to award injunctions, and that simply authorizes an injunction in favor of the plaintiff. *N. Y. Superior Ct.*, 1865, *Springsteen v. Powers*, 4 *Rob.*, 624.
23. That an act in violation of an injunction is not, therefore void or ineffectual. *N. Y. Superior Ct. Sp. T.*, 1868, *Butler v. Niles*, 39 *How. Pr.*, 329.

CONTEMPT.

INSURANCE.

1. The words "the assured," in the covenant to pay contained in a policy of life insurance, are to be construed to mean the person for whose benefit the insurance is made, rather than the one on whose life it depends. Thus where one person procures his own life to be insured, pays the premium, and accepts the policy, expressed to be for the benefit of a third person, the latter may recover thereon by an action in his or her own name. *N. Y. Superior Ct.*, 1868, *Hogle v. Guardian Life Ins. Co.*, *Ante*, 346.
2. An erroneous answer by an applicant for insurance, addressed to the medical examiner employed by the insurance company,—*Held*, not to amount to a misrepresentation. *Id.*

INTERPLEADER.

In an action upon a note the defendant showed that the note was given for the price of goods sold to the defendant, and that a third person had

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sued defendant for the proceeds of the same sale, alleging that he sold the goods to the defendant in his own right, while the plaintiff claimed that such third person, in selling the goods, had acted as plaintiff's agent.—*Held*, that the case was a proper one for an order that, upon defendant's paying the amount of the note and interest into court, such third person should be substituted as defendant, and the present defendant be discharged. *N. Y. Com. Pl. Sp. T.*, 1867, *Johnson v. Lewis*, *Ante*, 150.

JOINDER OF ACTIONS.

1. In an action for damages for fraud in inducing the plaintiff to marry the defendant, the plaintiff joined a cause of action for assault and battery.—*Held*, that the defendant, by not demurring to the complaint, waived the objection, if any, to the misjoinder of the causes of action, and could not require the plaintiff to elect at the trial for which cause of action she would recover. The plaintiff was entitled under such pleadings to give evidence of the assault, and make it the basis of a claim for damages—at least as an aggravation of the damages for the main cause of action. *Ct. of Appeals*, 1868, *Blossom v. Barrett*, 37 *N. Y.*, 434.
2. A cause of action for the recovery of money collected upon a judgment, regular on its face, not being for a tort, is improperly united with a cause of action to recover damages for an alleged false imprisonment of the plaintiff, where it does not appear satisfactorily and clearly from the complaint, by a proper statement of the facts, that the causes of action arose out of the same transaction. A mere general allegation is not enough. *Supreme Ct.*, 1867, *Flynn v. Bailey*, 50 *Barb.*, 73.
3. There was a trust created by different instruments and involving both real and personal property, for the purpose of securing the board and maintenance of the *cestui que trust*. After the death of both trustee and *cestui que trust*, the administrators and the heirs at law of the *cestui que trust* brought an action against the widow and heirs at law of the trustee, among whom his estate had been distributed, to settle the accounts of the trust, and to obtain a conveyance of the real estate, and payment of the funds of the trust.—*Held*, that the complaint was not obnoxious to the objection of joining improperly several causes of action. It is proper to unite in the same action every thing connected with such trust, and arising from it. The plaintiffs are properly joined as such, because they represent both the personal estate and the real estate, and the administrators of the deceased trustee are not necessarily joined, the estate having been distributed. Such a cause of action is to be regarded as affecting all the parties, and is within the rule favored in equity, authorizing all the parties interested to be brought in, in one action. [Reviewing authorities.] *Supreme Ct.*, 1867 *Richtmyer v. Richtmyer*, 50 *Barb.*, 55.

JUDGMENT.

JOINT DEBTORS.

1. A summons against a joint debtor not served in the action, requiring him (under section 375 of the Code of Procedure), to show cause why he should not be bound by the judgment, cannot be issued on a judgment of the marine or district court, although it has been docketed in the county clerk's office. *N. Y. Com. Pl.*, 1868, *Ticknor v. Kennedy*, *Ante*, 416.
2. *It seems*, that the remedy to make a judgment binding upon joint debtors not served which is given by sections 375, &c., of the Code of Procedure, is not a cumulative remedy, but is substituted for the former practice allowing a new action. *N. Y. Superior Ct.*, 1866, *Lane v. Salter*, 4 *Rob.*, 239.

JUDGMENT, 9.

JOINT-STOCK COMPANIES.

The rules applicable to proceedings for the dissolution of joint-stock companies and the appointment of receivers at the instance of stockholders,—discussed and applied. *Waterbury v. Merchants' Union Express Co.*, 50 *Barb.*, 157.

INJUNCTION, 20.

JUDGE.

A justice of the supreme court sitting in chambers, and not as a court, cannot make any order, in a proceeding to enforce a State lien against a vessel, upon a warrant issued by another justice sitting as a commissioner, until an issue has been framed between the contestants for the proceeds of the sale. *Supreme Ct. Chambers*, 1867, *Matter of Steamship Circassian*, 50 *Barb.*, 490.

COURT; INJUNCTION, 9, 12.

JUDGMENT.

1. In an action for a penalty for passing around a toll-gate to avoid payment of toll, the defendant tendered the amount of toll and brought the amount into court.—*Held*, that failing to recover the penalty, he was not entitled to judgment for the amount tendered. The usual rule is not applicable in an action for a penalty for a fixed amount and that alone. *Supreme Ct.*, 1866, *Canastota & Morrisville Plank Road Co. v. Parkell*, 50 *Barb.*, 601.
2. *It seems*, that in an action against several sureties who are bound to contribute, the plaintiff is not entitled to a judgment against them jointly, on which he might collect the whole amount from only one, but that the proper judgment or decree in such case should determine the sums which the several defendants are bound to contribute. If, however, no objection

- is taken by the defendants to a joint judgment in the court below, the court of appeals will not reverse it on these grounds. *Ct. of Appeals*, 1868, *Armitage v. Pulver*, 37 *N. Y.*, 494.
3. Plaintiff gave his bond to a third person for the benefit of his wife, and subsequently, on his wife's death, was appointed her administrator.—*Held*, that in his action as administrator to recover the bond, the judgment ought not to direct it to be canceled, but merely to be given up to him. *Supreme Ct.*, 1862, *Halstead v. McChesney*, 50 *Barb.*, 34.
 4. In an action for the recovery of specific personal property, a verdict and judgment in form as if the action were on the case, are wholly unwarranted. *Supreme Ct.*, 1867, *Wheeler v. Allen*, 49 *Barb.*, 460.
 5. In an action for dower, judgment that the part of the land should be set out by a referee (who was thereby empowered to set the same out for such dower), should be assigned to the plaintiff for the same, and that the defendant and all claiming under him should deliver possession thereof to her, and that defendant should pay to the plaintiff one third part of the rents and profits of such land for six years next preceding the entry of such judgment, to be ascertained by the same referee, and an award of costs and an execution to the plaintiff is proper in form. [4 *N. Y.*, 416; 15 *How. Pr.*, 57.] *N. Y. Superior Ct.*, 1866, *Brown v. Brown*, 4 *Rob.*, 699.
 6. *It seems*, that although the complaint charges a conversion of money of the plaintiff by the defendant, and claims damages, and the evidence fails to show a conversion, yet if it appears that the defendant has received the money in question to the plaintiff's use, the plaintiff may, under the Code of Procedure, recover as for money received. *Ct. of Appeals*, 1867, *Gordon v. Hostetter*, *Ante*, 263.
 7. In an action upon a contract made since the passage of the legal tender act,—*e. g.*, a bill of exchange drawn abroad and accepted in this country,—which is by its terms made "payable in gold coin," the plaintiff is entitled to judgment for a sum equal to the value, at the time of the trial, of the specified amount of gold estimated in currency. *Supreme Ct. Circ.*, 1858, *Bank of Prince Edward's Island v. Trumbull*, *Ante*, 82.
 8. If a judgment be entered in such a manner as not to embody the actual decision of the court, the remedy of any aggrieved party is by motion to correct the mistake; and if it be correctly entered but be erroneous in law, the only remedy is by appeal. [5 *Seld.*, 266.] *Supreme Ct.*, 1867, *People v. City of Brooklyn*, 49 *Barb.*, 136.
 9. In a joint action, upon a joint contract, an appeal by one of the defendants alone from a judgment against both, and the reversal thereon of such judgment, is a reversal as against *both*; and the defendant succeeding on such appeal cannot recover judgment on a second trial while the judgment is treated as having remained in force, and has been executed by payment by the other defendant. A judgment in favor of the defendant so appealing, recovered on a supplementary answer, setting up such payment by his co-defendant, must be reversed for irregularity, and a new

JURY.

- trial ordered between both defendants, unless one of them be struck out by leave of the court. *N. Y. Superior Ct.*, 1865, *Brown v. Richardson*, 4 *Rob.*, 603.
10. An application by a judgment debtor to have his real property exonerated from the lien of the judgment, pending an appeal on which he has given security, is addressed to the discretion of the court, and this discretion is to be carefully exercised for the protection of the creditor. *N. Y. Common Pleas, Sp. T.*, 1868, *Orchard v. Binninger*, *Ante*, 368.
 11. In this case the court required the execution of a specific lien upon real estate of a sufficient value to cover the plaintiff's demand. *Ib.*
 12. A judgment rendered upon *certiorari* to commissioners of estimate and assessment in proceedings for a local improvement, declaring the proceedings had in relation to the improvement to be reversed, amounts to a reversal of all proceedings taken in the matter, and the commissioners have not a continuing authority to go on after such reversal, and make a new report. Their appointment is annulled by such an unqualified reversal. *Supreme Ct.*, 1867, *People v. City of Brooklyn*, 49 *Barb.*, 136.
 13. Whether a judgment in a joint action against all the makers of a joint and several note, recovered on service of process upon some of them only, is a bar to another action against them,—*Query?* *Lane v. Salter*, 4 *Rob.*, 239.

APPEAL, 1, 5; FORMER ADJUDICATION.

JURISDICTION.

1. Residents of this State brought an action in a foreign State against a railroad corporation of this State, and attached in such foreign State the rolling stock of the corporation situated there.—*Held*, that mortgagees of the attached property, claiming under mortgages which might be valid by the law of one State and invalid by the law of the other, could bring an action in the courts of this State to restrain the plaintiffs in the attachment from selling the property pending the attachment suit. The courts of this State may enjoin residents of this State from proceeding in the courts of another State where a special case justifying the interference of the court is shown. *Supreme Ct. Sp. T.*, 1867, *Vail v. Knapp*, 49 *Barb.*, 299.
2. In an action to cancel an usurious mortgage, the mere circumstance that the land is in another State does not furnish a reason for denying the jurisdiction of our courts, or for questioning the propriety of its exercise. *Ct. of Appeals*, 1868, *Williams v. Fitzhugh*, 37 *N. Y.*, 444.

ATTACHMENT, 1; CITY JUDGE; FOREIGN CORPORATION.

JURY.

An inhabitant of a county is not disqualified by interest from serving on the jury, on a trial for stealing the property of the county. *Ct. of Appeals*, 1867, *People v. Bennett*, *Ante*, 89.

JUSTICES' COURTS.

1. A right of way existing under a reservation or exception in a deed, to cross land for a specific purpose, is an easement, and cannot be tried in a justice's court. *Supreme Ct.*, 1867, *Alleman v. Dey*, 49 *Barb.*, 641.
2. Where a justice deposes a person to make service of a summons in the same manner as a constable, as he is authorized by the statute, the proof of service by such person must be by a return, such as is required by the statute from constables. Proof of service by affidavit, without a written return, is not enough to give the justice jurisdiction of the action. *Supreme Ct.*, 1868, *Jackson v. Sherwood*, 50 *Barb.*, 356.
3. In an action against a railroad company, service on a director is regular. [Code, § 134; 24 *Barb.*, 414; 18 *Id.*, 574.] *Supreme Ct.*, 1867, *Curtis v. Avon, Ceneso & Mount Morris R. R. Co.*, 49 *Barb.*, 148.
4. On an application by a party for an adjournment, in a justice's court, the justice has the right to allow the opposite party to introduce evidence showing that the application is not made in good faith, and is groundless; and an appellate court will not interfere with the discretion of a justice of the peace in determining a question of adjournment, except in a clear case of an abuse of such discretion. *Supreme Ct.*, 1868, *Weed v. Lee*, 50 *Barb.*, 354.
5. In section 353 of the Code of Procedure, regulating appeals from judgments in justices' courts,—which provides that if the judgment is rendered upon process not personally served, and a defendant did not appear, he shall have twenty days after *personal notice* of the judgment to serve a notice of appeal,—“personal notice” means a personal written notice from the party who has obtained the judgment. Personal knowledge derived from other sources is not personal notice within the meaning of the statute, and does not limit the time for taking an appeal. The statute is to be liberally construed in furtherance of justice, and an interpretation which forfeits the right is not to be favored. *Supreme Ct.*, 1866, *Pearson v. Lovejoy*, 35 *How. Pr.*, 193.
6. An order made by the county court dismissing an appeal from a judgment of a justice of the peace, on the ground that it was taken after the time for appealing had elapsed, is to be deemed a judgment, within the meaning of section 245 of the Code of Procedure. It is a final determination of the rights of the parties in the action, for there is no redress left to the appellant and the action is, in fact, decided in favor of the respondent. [23 *N. Y.*, 17; 6 *Hill*, 157; 4 *Wend.*, 433; 4 *How. Pr.*, 195; 3 *N. Y.* (3 *Comst.*), 546; 7 *How. Pr.*, 194; 12 *Johns.*, 31.] *Supreme Ct.*, 1866, *Pearson v. Lovejoy*, 35 *How. Pr.*, 193.
7. On an appeal to the county court from a judgment of a justice's court, the county court should disregard errors of the justice not affecting the merits, and give judgment according to the justice of the case. *Supreme Ct.*, 1867, *Osineup v. Nichols*, 49 *Barb.*, 146.

FORMER ADJUDICATION.

8. Where a justice errs in rendering judgment for too large a sum, it is not necessary that the appellate court should reverse the judgment absolutely. It may be reversed unless the plaintiff remits the excess. [2 Seld., 97. 104.] And the supreme court, on an appeal, may correct the judgment, where the excess is beyond the sum claimed in the complaint, by conforming it to the pleadings in this respect. *Supreme Ct.*, 1868, *Weed v. Lee*, 50 *Barb.*, 354.
9. On justice's refusal to tax costs and allow them in the judgment, upon the plaintiff's offer, after appeal, the county court, on motion, taxed the costs, and entered judgment; and this decision was affirmed on appeal. *Supreme Ct.*, 1868, *Ponto v. Phelps*, 35 *How. Pr.*, 364.

COSTS.

LANDS.

1. On a question of the validity of the sale of lands by the commissioners of the land-office, the court will not inquire as to the regularity of a motion in the board directing such sale, if the resolution was duly passed. *Ct. of Appeals*, 1868, *Candee v. Hayward*, 37 *N. Y.*, 653.
2. The provisions of 1 *Revised Statutes*, 594, section 55,—regulating the sale of lands by the commissioner of the land-office,—direct that if the original purchaser wishes he may redeem the land from the sale at any time within three months after such sale. Subsequent sections provide that if he do not redeem, the State engineer may sell again; but there is no further provision as to the right of the original purchaser to redeem after such second sale.—*Held*, that no such right exists. *Ib.*
3. The provisions of section 55 of the same act,—that whenever the commissioners direct a re-sale they shall give notice to every occupant,—are not intended as a condition precedent to the power of sale, nor for the benefit of those interested, but are merely a convenient remedy for the commissioners to effect a speedy removal of the occupants from the land. *Ib.*

LICENSE.

DEFENSES, 11.

LIEN.

Of the lien of the keeper of a boarding-house upon the effects of a boarder. *Shafer v. Guest*, 35 *How. Pr.*, 184.

LIMITATIONS OF ACTIONS.

1. Upon a promissory note payable on demand, the statute of limitations begins to run from the date, and not from the time of the demand of

MANDAMUS.

- payment. [Reviewing many authorities.] *Supreme Ct.*, 1867, *Hirst v. Brooks*, 50 *Barb.*, 334.
2. The delivery at one time, of a quantity of merchandise sold, but not furnished under or in pursuance of any express agreement, creates a contract by implication; and a right of action accrues to the vendors immediately on the delivery of the merchandise. The statute of limitations, therefore, begins to run from that time. *N. Y. Superior Ct.*, 1865, *Turner v. Martin*, 4 *Rob.*, 661.
 3. The provisions of section 90 of the Code of Procedure, subd. 6,—that certain causes of action involving fraud are not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud,—is not to be taken as meaning that the action shall be deemed as accruing upon the discovery of the fraud, whether the right of action is then perfect or not, in other respects. The object of the statute is merely to prevent the running of the statute, where the cause of action is already perfect, but the fraud not discovered. Thus a creditor's action is not barred by the lapse of time from the discovery of the fraud, where that took place before the recovery of judgment and return of execution. *Ct. of Appeals*, 1868, *Gates v. Andrews*, 37 *N. Y.*, 657.
 4. The fact that a simple contract debt is barred by the statute of limitations, does not entitle the debtor to maintain an action against the creditor with whom he had pledged securities therefor, to recover back the securities without payment of the debt. The statute, in its terms, is a mere bar to an action. It is at most a mere presumption of payment, and where the case admits that the debt has not in fact been paid, it does not entitle the pledgor to recover the pledge without payment. *N. Y. Superior Ct.*, 1867, *Jones v. Merchants' Bank of Albany*, 4 *Rob.*, 221.

DEFENSES, 7, 8; EXECUTORS AND ADMINISTRATORS, 5.

MANDAMUS.

1. Upon the refusal of the county treasurer to issue his warrant for the collection of a tax, &c., a proceeding by mandamus is the proper remedy, and may be instituted by any citizen having a common interest in the collection of the tax. [19 *Wend.*, 56; 18 *How. Pr.*, 463; 1 *Id.*, 199; 4 *Hill*, 20; 8 *N. Y.*, 317.] *Ct. of Appeals*, 1867, *People v. Halsey*, 37 *N. Y.*, 344.
2. Writ of mandamus not to be issued to compel public officers to award a contract in a doubtful case,—*e. g.*, where, after advertising for bids, they have materially modified the work to be done, in reference to the requirements of the public interest. *Supreme Ct.*, 1867, *People v. Croton Aqueduct Board*, 49 *Barb.*, 259.

APPEAL, 8.

MOTIONS AND ORDERS.

MECHANICS' LIENS.

1. The act to give mechanics' liens in the city of New York (*Laws of 1863*, 859, § 6), amended as to filing of the notice of lien, and proceedings thereon. 1 *Laws of 1868*, 118, ch. 79.
2. The lien which a contractor for the erection of a building acquires by filing a notice with the county clerk, under the mechanics' lien law (*Laws of 1851*, ch. 513), attaches only to the legal right, title and interest of the owner, then existing. If, previous to the filing of such notice, the owner has parted with his interest in the property, no lien is acquired. *Supreme Ct.*, 1867, *Ernst v. Reed*, 49 *Barb.*, 367.

MONEY PAID.

An action does not lie against a mortgagor to compel him to refund the amount of his mortgage, which has been paid and canceled by money fraudulently procured from the plaintiff without the mortgagor's knowledge, privity or consent. *Ct. of Appeals*, 1867, *Henry v. Wilkes*, 37 *N. Y.*, 562.

MONEY RECEIVED.

An action for money had and received will not lie against a municipal corporation, to recover back the amount of a tax collected and paid into their treasury, which was erroneously assessed upon the plaintiff. Where assessors have jurisdiction of the person of the plaintiff, and of the subject-matter of taxation, although their assessment may be erroneous, it is not void, and can be corrected only by an appropriate proceeding for such purpose, and does not lay the foundation for an action at law to redress the alleged injury. *Ct. of Appeals*, 1868, *Swift v. City of Poughkeepsie*, 37 *N. Y.*, 511.

MORTGAGES.

1. An act to authorize the discharge of mortgages to commissioners of United States deposit fund. 2 *Laws of 1868*, 1544, ch. 698.
2. The proceedings given by the act of 1862 for the cancelment of record of mortgages which, from a lapse of time, are presumed to be paid, by order of court upon petition of the mortgagor or other person interested in the land,—amended. 2 *Laws of 1868*, 1786, ch. 798.

FORECLOSURE.

MOTIONS AND ORDERS.

1. An order to show cause which is made returnable in less than eight days will be sustained, where immediate urgency for an injunction sought for appears upon the face of the evidence. *N. Y. Superior Ct.*, 1865, *Springsteen v. Powers*, 4 *Rob.*, 624.

MUNICIPAL CORPORATIONS.

2. A receiver of a bank, appointed in special proceedings pending an action by third parties against the bank, is not entitled to interfere directly in the action by giving notice of a motion or conducting an appeal. A motion to dissolve an attachment, like any other motion, can only be made by a party to the action. The receiver is a stranger to the proceedings unless he makes himself a party under sections 121 and 122 of the Code. *Ct. of Appeals*, 1868, *Tracy v. First National Bank of Selma*, 37 *N. Y.*, 523.
3. An order of the court is not to be presumed irregular because it does not appear to have been made at a regularly adjourned special term, nor is it irregular because not actually entered by the clerk. This omission may be supplied *nunc pro tunc* when necessary to sustain proceedings had in good faith and otherwise unexceptionable. *Supreme Ct.*, 1867, *People v. Central City Bank*, 35 *How Pr.*, 428.
4. Evidence of the service of an order to show cause, although not recited in an order appointing a receiver, may be presumed to have been presented, in support of such order. *Supreme Ct.*, 1867, *People v. Central City Bank*, 35 *How. Pr.*, 428.
5. The court will not allow a re-argument based upon allegations that upon the former decision, by a general term differently constituted from the one to which the application is made, the court misunderstood the facts or evidence in the case, and that they ordered a new trial for excess in the damages, instead of correcting it by deducting the excess, unless it appear upon an examination of the evidence that there were no material facts upon which there was such evidence as to require them to be submitted to a jury. Courts, other than those of last resort, should not, in ordinary cases, allow re-arguments merely for the sake of correcting supposed errors, unless the moving party secures from the prior court some acknowledgment of oversight or error. *N. Y. Superior Ct.*, 1866, *Newell v. Wheeler*, 4 *Rob.*, 190.

EXECUTORS AND ADMINISTRATORS, 2-4.

MUNICIPAL CORPORATIONS.

- I. A municipal corporation authorized to make ordinances for the purpose of regulating city railroad cars, prohibiting nuisances, and preventing and removing obstructions on the streets, is not thereby authorized to interfere at a specific point, with the tracks or business of a railroad which is established and conducted under a legislative grant. *Supreme Ct. Sp. T.*, 1867, *Brooklyn City R. R. Co. v. Furey*, *Ante*, 364. (Compare *Schuster v. Metropolitan Board of Health*, 49 *Barb.*, 450.)
2. The question whether the tracks and arrangements of the company are within the authority granted by the legislature, is not to be determined summarily by the officers of the corporation, under ordinances giving them supervision of the streets, and power to prohibit and remove obstructions, but must be determined by a legal or equitable remedy. *Ib.*
3. The unanimous consent required by law to the enactment of an ordinance

NEW TRIAL.

by both boards on the same day, in the corporation of the city of New York, may be presumed from the fact that no objection was made at the time, and that all the members present voted for the ordinance. *Supreme Ct.*, 1868, *Lewis v. Mayor, &c.*, 35 *How. Pr.*, 162.

4. Two days' publication, though necessary for the passage of an ordinance, is not necessary for its amendment. *Ib.*
5. The right of a private member of a municipal corporation to demand a general inspection of the documents in the hands of an officer of the corporation,—denied, in the absence of showing any private or personal interest in the documents in question. *Supreme Ct.*, 1868, *People v. Henry*, 35 *How. Pr.*, 31.

NEW YORK.

NEGLIGENCE.

Liability of the city of New York, and of a private owner of property therein, for injuries sustained by a blind person in consequence of defects in the sidewalk. *Davenport v. Ruckman*, 37 *N. Y.*, 568.

Compare, as to the duty of owners in respect to water pipes, *Robbins v. Mount*, 4 *Rob.*, 553.

NEW TRIAL.

1. A motion for a new trial cannot be made after judgment entered absolutely. But the motion may be made by leave of the court, when a sufficient excuse is offered for not making it before judgment; and if necessary the court can convert the absolute judgment into one to stand merely as security. *N. Y. Superior Ct.*, 1865, *Stilwell v. Staples*, 4 *Rob.*, 639.
2. It is the duty of a referee before whom a cause is pending, when the evidence in it is conflicting and of equal weight on both sides, and there are no circumstances to detract from, or add to, the weight of that on either side, to decide against the party upon whom the burden of proof rests. Where a tribunal has not done so, it may be inferred that such tribunal was governed by an erroneous rule of evidence. *N. Y. Superior Ct.*, 1867, *Strong v. Place*, 4 *Rob.*, 335.
3. The court will presume that the referee did not fail to consider the evidence, and it is for the objecting party to show clearly that he has failed to do so, if he would have the judgment reversed upon such a ground. *Supreme Ct.*, 1867, *Lewis v. Greider*, 49 *Barb.*, 606.
4. The positive testimony of an unimpeached and uncontradicted witness cannot be arbitrarily disregarded without entitling the aggrieved party to a new trial. *Supreme Ct.*, 1867, *Seibert v. Erie R. R. Co.*, 49 *Barb.*, 583.
5. Where no exception is taken, specially, to the allowance of interest in the report of a referee, the party cannot avail himself of the objection on a motion for a new trial. *Supreme Ct.*, 1867, *Sipperly v. Stewart*, 50 *Barb.*, 62.

6. An action on contract was dismissed at the trial solely on the ground that the instrument was not properly stamped.—*Held*, that on complainant's affidavit that he was surprised at the trial by the ruling that it was not properly stamped, and upon his producing the instrument subsequently duly stamped by the collector, it was competent for the justice who tried the action to set aside the judgment and order a new trial. *Supreme Ct.*, 1867, *Hoppock v. Stone*, 49 *Barb.*, 524.
7. In an action for criminal conversation, it appeared that the husband connived at the intercourse, but the defendant did not request the judge to apply the rule of the law that such connivance is a bar to the action, and the plaintiff recovered a verdict.—*Held*, that the verdict should be set aside on appeal. *Supreme Ct.*, 1867, *Bunnell v. Greathead*, 49 *Barb.*, 106.
8. In an action of an equitable nature, where the entire question of costs will be in the discretion of the court, and may be adjudged upon the final hearing, no direction as to costs ought to be made by the general term, on awarding a new trial because of the insufficiency of the evidence. *N. Y. Superior Ct.*, 1865, *Pennell v. Wilson*, 4 *Rob.*, 610.
9. A conviction will not be set aside on the ground that a witness testified to another offense than the one charged in the indictment, where it appears by the case that such evidence was interrupted by objection taken by prisoner's counsel, and was excluded on the attention of the court being called to the ground of objection. *Ct. of Appeals*, 1867, *People v. Wentz*, 37 *N. Y.*, 303.

APPEAL; CASE; EVIDENCE; EXCEPTIONS; TRIAL.

NEW YORK (CITY OF)

1. Proceedings to compel the observance of the building laws of the city of New York, by application to the supreme court for an order,—regulated. 2 *Laws of 1868*, 1352, § 10, ch. 634.
2. The common council of New York may be enjoined, at the suit of an individual owner, from entering into a contract to lay a pavement which is patented, and therefore not open to competition, where the work is to be done at the expense of the individual owners of property upon the street. *Supreme Ct. Chambers*, 1868, *Dolan v. Mayor, &c. of N. Y.*, *Ante*, 397.
3. The act of 1863 (2 *Laws of 1868*, 2022, 853, § 7),—which declares that the comptroller of the city of New York "is authorized, in order to save expense of litigation and interest, to adjust any claim on which suit is brought against the city, and when adjusted to duly provide for its payment,"—is mandatory in respect to providing for payment after such an adjustment of the amount has been had. *Supreme Ct. Sp. T.*, 1868, *People ex rel. Raymond v. Connolly*, *Ante*, 375.
4. A madamus may issue to compel the comptroller to provide for payment of a claim which he has adjusted under the act. *Ib.*
5. The provisions of section 3 of the act of 1864 (*Laws of 1864*, 945),—authorizing the city tax-payers to maintain actions against officers of the

NONSUIT.

corporation in certain cases,—do not authorize such an action to enjoin the carrying out of a contract made by the municipal authorities under the positive requirements of an act of legislature, appropriating the necessary money's, and containing provisions intended to secure the expenditure, whether the corporation should assent or not. *Supreme Ct., Brady v. Mayor, &c., 35 How. Pr., 81.*

6. That statute (1867) does not authorize such an action to be maintained against the board of audit for the city and county of New York. *Supreme Ct. Sp. T., 1867, Sherwood v. Connolly, 35 How. Pr., 124.*

NEW YORK COMMON PLEAS.

The court of common pleas of the city of New York, as a court of equity jurisdiction having the same powers exercised by the late court of chancery, where the defendant resides or is served within the city, has jurisdiction to entertain an action against a collector at the suit of the executor or administrator, to compel him to account for the funds of the trust collected by him. The jurisdiction of the surrogate to compel an accounting is not exclusive. *N. Y. Common Pleas Sp. T., 1867, Christy v. Libby, 35 How. Pr., 119.*

NEW YORK SUPERIOR COURT.

1. An action to set aside a fraudulent conveyance of land in another State, dismissed on the objection that it was not within the jurisdiction of the court. *N. Y. Superior Ct., 1865, Bennett v. Erving, 4 Rob., 671.*
2. The practice as to moving on causes on the calendar stated as follows: "A cause not upon the calendar cannot be moved on for trial, and a party not finding the cause on the calendar of the term for which he has received notice of trial, is not bound to examine from term to term, thereafter, to ascertain if the cause is in a condition to be called up for trial. Formerly, a notice of trial and a note of issue were both required for each term of the court; the alteration in that respect, in the first judicial district, merely requires one notice and one note of issue, but does not relieve parties from the necessity of placing their causes upon the calendar for the same term for which the trials are noticed. If the cause is not placed upon the calendar at the term for which notice of trial is given, an inquest cannot be taken at a subsequent term upon that notice." *N. Y. Superior Ct. Sp. T., 1866, Culver v. Felt, 4 Rob., 681.*

NONSUIT.

Nonsuit should not be granted where there is some evidence, although slight, in favor of the plaintiff's case; but the question should be submitted to the jury. *N. Y. Superior Ct., 1866, Ross v. Mayor, &c. of N. Y., 4 Rob., 49.*

NOTICE.

1. Where the commissioners of the land-office order a resale of lands, and direct in what paper the notice of resale shall be published, it will be sufficient, if it appear that the notice is published in the paper intended by the order. *Ct. of Appeals*, 1868, *Candee v. Hayward*, 37 *N. Y.*, 653.
2. Under the statute authorizing certain local improvements (act of 1839, 182),—requiring a notice to be given specifying the time, &c., of application for appointment of commissioners *and the nature and extent of the intended improvement*,—it is necessary that the whole extent of the intention of a street opening should be stated in the notice. The owners are to be informed by it what property is to be taken. A reference to a map on file in some public office is not a compliance with the statute. *Supreme Ct.*, 1868, *Matter of Commissioners of Central Park*, 35 *How. Pr.*, 255.
3. Owners do not, by appearing before the commissioners and claiming allowances for their lands, waive their objection to a defective jurisdiction in this respect. The commissioners must be confined to the land which the notice describes as required for the improvement. *Ib.*
4. That notice given to the director of a bank that a note is an accommodation note, when he was not acting as director, in the discounting of the note, does not bind or prejudice the bank. *Ct. of Appeals*, 1867, *President, &c. v. Cornen*, 37 *N. Y.*, 320.

OFFICERS.

1. The determination of the assessors to impose a tax is a judicial determination; and an error therein, although it may be corrected by an appropriate proceeding, does not lay the foundation for an action at law by the person assessed to redress the alleged injury. *Ct. of Appeals*, 1867, *Foster v. Van Wyck*, *Ante*, 469.
2. Commissioners of estimate and assessment in proceedings for a local improvement are *functi officio* after making a final report. *Supreme Ct.*, 1867, *People v. City of Brooklyn*, 49 *Barb.*, 136.

INJUNCTION; POWERS.

OYER AND TERMINER.

Under the provisions of the Code of Procedure, directing the judges of the supreme court in each district to appoint times and places of holding courts in their respective districts, it is not competent to a single judge, holding a court of oyer and terminer, to adjourn such court to a place which has not been designated by the judges acting together, as a place for holding it. *Ct. of Appeals*, 1867, *Northrup v. People*, *Ante*, 227.

PARTIES.

PLACE OF TRIAL.

1. An action to set aside a statutory foreclosure of a mortgage of real property, and to redeem the land from the mortgage, is not local, and necessarily to be tried within the county where the land is situated. *Supreme Ct. Sp. T.*, 1868, *Hubbell v. Sibley*, *Ante*, 403.
2. The first clause of section 123 of the Code of Procedure,—by which actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property are made local,—is to be construed as relating to actions in the nature of ejectment and trespass, and others which were formerly causes of legal cognizance solely. *Ib.*

PARTIES.

1. Of the effect of the provision of section 3 of the Code of Procedure,—allowing an action for lands to be brought by the grantee in the grantor's name. *Hamilton v. Wright*, 37 *N. Y.*, 502.
2. The liability for personal injury occasioned by a nuisance which is continued by several persons, is joint as well as several, and one action may be brought against all of them together. [29 *N. Y.*, 291.] *N. Y. Superior Ct.*, 1866, *Irvin v. Wood*, 4 *Rob.*, 138.
3. Executors having a naked power, not liable as owners, for a nuisance. *N. Y. Superior Ct.*, 1867, *Robbins v. Mount*, 4 *Rob.*, 553.
4. The provisions of 1 *Rev. Stat.*, 846, § 1,—that actions and proceedings by or against a county shall be in the name of the board of supervisors,—is not exclusive of the right of an individual relator having an interest, to proceed by mandamus in the name of the people. Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people and for the general benefit. The rule, therefore, as is sometimes stated, that a relator in a writ of mandamus must show an individual right to the thing asked, must be taken to apply to cases where an individual interest is alone involved, and not in cases where the interest is common to the whole community. [3 *Ind.*, 452; *Id.*, 390; 11 *Ill.*, 202.] *Ct. of Appeals*, 1867, *People v. Halsey*, 37 *N. Y.*, 344.
5. It would be otherwise of an *action*, as distinguished from a proceeding by mandamus. *Ib.*
6. A national bank, created under the act of Congress, can be sued in the courts of a State other than that in which it is located. This is declared, in effect, by section 8 of the bank act; and section 57,—providing that actions may be had in courts of the United States,—is not exclusive. *Supreme Ct. Sp. T.*, 1867, *Cooke v. State National Bank of Boston*, 50 *Barb.*, 339.

PARTITION.

7. Tenants in common of lands must all be joined as parties, in an action to recover damages for trespass upon such lands. This common law rule has not been altered by the Code of Procedure. *Ct. of Appeals*, 1867, *Deputy v. Strong*, *Ante*, 340.
8. The provision of the act of 1831,—authorizing the court, on the publication of an order requiring non-resident defendants, whether minors or of full age, to appear and answer in a partition suit, to make a decree or order for taking the bill as confessed against all such non-resident defendants,—was not repealed by the act of 1833, ch. 227,—which authorized the chancellor to appoint an officer of the court guardian *ad litem*; and infant children made parties to a partition without appointment of a guardian *ad litem* are bound by the judgment of partition, especially after years have elapsed since they have attained majority, and their acquiescence in the decree. *Ct. of Appeals*, 1867, *Clemens v. Clemens*, 37 *N. Y.*, 59.
9. In an action for an injunction, and a receiver to close the business of a special partnership formed on the statute, based on the ground of insolvency, it is necessary to bring before the court, as parties, all who have an interest in the members of the firm retaining control of the assets. Where one of the special partners is deceased, his executors or administrators should be joined as parties, and as they may represent conflicting interests, they should properly be made defendants. Especially ought they be brought in as parties where the decedent had covenanted that the partnership should continue for a term of years. *N. Y. Superior Ct.*, 1866, *Walkenshaw v. Perzel*, 4 *Rob.*, 426.
10. The provision of 1 *Rev. Stat.*, 766, § 14, as to the general partners suing or being sued alone, does not apply to such an action, but merely to claims by or against them as a partnership. *Id.*
11. A corporation stands in no fiduciary relation to its stockholders. The directors, not the corporate body, are the trustees, and should be parties to any action for the enforcement of the trust. *Supreme Ct. Sp. T.*, 1867, *Karnes v. Rochester & Genesee Valley R. R.*, *Ante*, 107.
12. The rule that the creditor of the estate of a deceased person cannot maintain an action against a fraudulent vendee to impeach a sale, ordinarily applies only to *personal property*; and such action may be maintained in a proper case, against a fraudulent assignee of *real property*, where the executor or administrator refuses to sue. *Supreme Ct. Sp. T.*, 1867, *Phelps v. Platt*, 50 *Barb.*, 430.

COMPLAINT, 5.

PARTITION.

1. Under our statutes an actual partition, or sale, under a judgment in partition, is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will,

PLEADING.

- and not as claimants under any of the parties to the action. And independent of statute, the contingent remainder-men, or persons taking under an executory devise, who may thereafter come into being, are bound by the judgment as being virtually represented by the parties to the action in whom the present estate is vested. [17 N. Y., 210.] *Ct. of Appeals*, 1867, *Clemens v. Clemens*, 37 N. Y., 59.
2. This principle was applied to the case of a partition action, where one of several named in the will as executors had taken on himself alone the burden of administration, and received letters testamentary from a foreign court, and the others named had died, or renounced in writing. *Ib.*

PARTNERSHIP.

1. The Open Board of Brokers in the city of New York is not a copartnership, within the operation of the equitable remedies afforded by the courts for the protection of the rights of partners as between themselves. *N. Y. Common Pleas*, 1868, *White v. Brownell*, *Ante*, 162.
2. Nor is that board a corporation, in such sense as to render it subject to the rules by which courts of equity interfere to restore a corporator who has been unlawfully expelled or disfranchised, to his privileges of membership. *Ib.*
3. Of the requisites of a notice to terminate a special partnership. *Mattison v. Demarest*, 4 *Rob.*, 161.

PETITION.

1. The case of *Kelly's Application* (10 *Abb. Pr.*, 208), upon the requisites of a petition under *Laws of 1843*, ch. 230, Art. II., § 12, (same statute, 1 *Rev. Stat.*, 5 ed., 965, § 63), to enforce the payment of a tax upon personal property,—approved and followed. *N. Y. Common Pleas Sp. T.*, 1868, *Smith v. International Life Assurance Co. of Boston*, *Ante*, 11.
2. Upon such a petition it is too late to question the legality of the tax. *Ib.*

PLEADING.

1. That, on the question of the sufficiency of a pleading, raised upon demurrer, the copy served upon the attorney of the demurrant must control. *N. Y. Superior Ct.*, 1866, *Lane v. Salter*, 14 *Rob.*, 239.
2. The rule, that when different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading,—applied. *Supreme Ct. Sp. T.*, 1867, *Winter v. Baker*, 50 *Barb.*, 432.
3. That the character in which a party is charged in the allegations of the pleading is to control, in testing the pleading on demurrer, rather than the description of him in the title. *N. Y. Common Pleas Sp. T.*, 1867, *Christy v. Libby*, 35 *How. Pr.*, 119.

PLEADING.

4. When the fact is alleged in the complaint, that the plaintiff was *duly* appointed a receiver, so that, if denied in the answer, the plaintiff would be bound to show, by competent evidence, the facts necessary to constitute him a lawful receiver, this allegation will be considered sufficient on demurrer. The remedy seems to be, under section 160 of the Code, to have the complaint made more definite and certain. [22 How. Pr., 236.] *Supreme Ct. Sp. T.*, 1867, *Phelps v. Platt*, 50 *Barb.*, 430.
5. In an action by trustees, if the complaint alleges a contract made with the plaintiffs as trustees, for the benefit of the trust, the designation of the plaintiffs as such is not to be regarded as merely matter of description, but as showing that they sue in their representative capacity. *Ct. of Appeals*, 1868, *Slocum v. Barry*, *Ante*, 399.
6. In an action against a sheriff for levying upon property exempt from execution, if the defendant relies entirely upon the execution, and nothing beyond it, it is sufficient for him, in such case, merely to set forth the writ in his answer, notwithstanding that the plaintiff, in his complaint, sets forth more than was necessary, alleging, in anticipation of the defense, that the property was taken on execution, and was, however, exempt from execution. Such unnecessary allegations do not make it necessary for the officer to plead the non-exemption of the property, or be excluded from proving it on the trial. If, however, the defendant, in order to establish his justification, desire to go *further*, and show that the property, although such as in general might be exempt, was not exempt in this case on account of the consideration of the judgment on which the execution was issued, it is necessary for him to plead such judgment in his answer. If he does not plead it, he is not at liberty to show its consideration in order to avoid the facts proved by the plaintiff. *Supreme Ct.*, 1866, *Dennis v. Snell*, 50 *Barb.*, 95.
7. In a complaint upon contract, parenthetical statements that words had been omitted from the contract by mistake,—*Held*, not an allegation of mistake as matter of fact, so as to entitle the plaintiff to prove it. *Supreme Ct.*, 1867, *Bush v. Tilley*, 49 *Barb.*, 599.
8. In an action for trespass upon lands held in common, if it appear by the complaint that the plaintiffs are only part of the owners, and it does not appear that the others are joined as defendants, by reason of not consenting to join in the action, a demurrer is the proper remedy to raise the objection of a defect of parties. *Ct. of Appeals*, 1867, *Depuy v. Strong*, *Ante*, 340.
9. An answer interposing that objection in such a case is a nullity. *Ib.*
10. If a demurrer to a complaint, on the ground that a defect of parties appears on its face, is overruled, the defect is waived by an answer interposing the same objection. Demurrer is the proper remedy, and if it be overruled, the defendant should appeal, if he would insist on the defect. *Ib.*
11. Section 6 of the act of Apr. 23, 1867, 2 *Laws of 1867*, 1606, ch. 586),—

POWERS.

- providing that actions against the corporation of the city of New York shall be brought in the supreme court of the first district,—is a public statute, and, although not pleaded, renders it the duty of any other court in which such an action is brought, to sustain a demurrer if interposed to the jurisdiction. *N. Y. Superior Ct.*, 1868, *Bretz v. Mayor, &c. of N. Y.*, *Ante*, 258.
12. That enactment is constitutional. *Ib.*
 13. A complaint, to charge a stockholder of a *foreign* corporation, should set forth the facts creating his liability. It is not enough to aver that he is a stockholder, and by virtue of a law or laws of the State, he is liable, without averring that the law was in force at the time the debt was contracted, and showing whether the liability was on contract, or in the nature of a penalty. *Supreme Ct. Sp. T.*, 1867, *Winter v. Baker*, 50 *Barb.*, 432.
 14. Where a complaint contains one good cause of action, and one improperly joined with it, on a demurrer for a misjoinder, the defendant is entitled to judgment, notwithstanding one cause of action is good. *Supreme Ct.*, 1867, *Flynn v. Bailey*, 50 *Barb.*, 73.
 15. Where a pleading is sustained—a demurrer being overruled—and leave is given to answer the pleading, the demurrant is put to his election to answer or submit to judgment; and if he submit to judgment it is final. *Ct. of Appeals*, 1868, *Whiting v. Mayor of N. Y.*, 37 *N. Y.*, 600.
 16. On a motion to strike out matter from a pleading as irrelevant, the court will not consider the question whether the matter forms the whole or a material part of a reference or counter-claim. Such question must be raised on demurrer or on the trial, unless the matter objected to is palpably frivolous or sham. *Supreme Ct.*, 1865, *McGregor v. McGregor*, 35 *How. Pr.*, 385.
 17. Payment of a counter-claim set up in the answer, made since the service of the answer and the first reply thereto, is properly the subject of a supplemental reply. *Supreme Ct. Sp. T.*, 1867, *Ormsbee v. Brown*, 50 *Barb.*, 436.

ANSWER; ASSIGNABILITY OF CAUSE OF ACTION, 1; COMPLAINT; COUNTER-CLAIM; DEMURRER; DISMISSAL OF COMPLAINT, 1; DIVORCE; VARIANCE.

POWERS.

1. Three commissioners were appointed in proceeding for a local improvement, and they all took the oath of office, met and agreed upon future meetings at a fixed day of the week; but one of them, although he met with the others on several occasions and transacted some business, and was notified in writing of several meetings, and did not resign or notify the others that he would not come, neglected to attend many meetings, and finally refused to sign the report.—*Held*, that the report was valid without

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his signature. *Supreme Ct.*, 1867, *Schuster v. Metropolitan Board of Health* 49 *Barb.*, 450.

But compare *Rector, &c. of Trinity Church v. Higgins*, 4 *Rob.*, 1 *N. Y. Superior Ct.*, 1866, where it was,—*Held*, that the assessment was void because one of the commissioners wholly declined to act.

PROTEST.

1. Where a promissory note specifies no place for payment, the rule requiring a demand of payment to be made personally upon the maker at his residence or place of business, is satisfied if due and reasonable diligence is used to ascertain such residence or place of business, without success; and the note may then be protested for non-payment, so as to charge indorsers. *Ct. of Appeals*, 1868, *Holtz v. Boppe*, 37 *N. Y.*, 634.
2. Notice given the day after the maturity of a promissory note, properly describing the paper, and merely stating that it had not been paid, and requesting payment, is not sufficient to charge the indorser. *Supreme Ct.*, 1867, *Arnold v. Kinloch*, 50 *Barb.*, 44.
3. The notice ought to state that the paper has been dishonored, or presented and payment demanded and refused. [Reviewing many authorities.] *Ib.*

PRINCIPAL AND SURETY.

A request that the creditor should "push" the principal debtor, and "keep pushing him,"—*Held*, not to amount to a request to prosecute or collect. *Supreme Ct.*, 1867, *Singer v. Troutman*, 49 *Barb.*, 182.

QUESTIONS OF LAW AND FACT.

A question of negligence arising upon doubtful facts should be submitted to the jury. *N. Y. Superior Ct.*, 1867, *Seabrook v. Hecker*, 4 *Rob.*, 344.

RAILROAD COMPANIES.

1. The Sixth Avenue Railroad Company in the city of New York had a right, notwithstanding the restriction in their grant to fares of five cents, to increase their fares to six cents, when paid in paper, upon the suspension of specie payments. *N. Y. Superior Ct.*, 1866, *Moneypenny v. Sixth Avenue R. R. Co.*, *Ante*, 357. Compare *Lewis v. N. Y. Central R. R. Co.*, 49 *Barb.*, 330.
2. The act of Congress (13 *U. S. Stat. at L.*, 276, 485),—which authorized railroad companies to add the tax to their fares,—empowered city railroads to make such increase. *Ib.*
3. The penal action given by the *Laws of N. Y.*, 1857, against railroad com-

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panies demanding fares in excess of the rate allowed by law, does not apply to city railroads. *Id.*

RECEIVER.

1. A mortgagee in possession, having been adjudged to be in possession, as such, and appointed receiver,—*Held*, that another judge should not remove him for any cause existing before the order of his appointment was made, but might control his administration of the trust. *Supreme Ct. Sp. T.*, 1867, *Bolles v. Duff*, 35 *How. Pr.*, 481.
2. In an action in which the plaintiff sought to charge the defendant as mortgagee in possession of a theatre, of which the defendant claimed to be owner, the defendant, after having been adjudged to hold as such mortgagee, and having been appointed receiver, was permitted, pending his appeal, to lease the premises in litigation, for a term of three years. *Supreme Ct. Sp. T.*, 1868, *Bolles v. Duff*, *Ante*, 330.
3. The receiver being an officer of the court, the court appointing him has authority to determine the rate of his compensation, which may be fixed in reference to the circumstances of the case. *Ct. of Appeals*, 1867, *Gardiners v. Tyler*, *Ante*, 463.

TIME (COMPUTATION OF).

RECOGNIZANCE.

The inability of the principal, by reason of sickness, to appear at court and answer to an indictment found against him, according to the terms of his recognizance, is a good defense to an action brought against his sureties upon the recognizance. [20 *N. Y.*, 197; 24 *Barb.*, 174; 3 *Hill*, 570 · 30 *Barb.*, 110.] *Ct. of Appeals*, 1868, *People v. Tubbs*, 37 *N. Y.*, 586.

RECORDING DEEDS.

1. That a contract for the entry upon land, and cutting down and removing timber from it, is one which must be recorded. *Supreme Ct.*, 1867, *Voreback v. Roe*, 50 *Barb.*, 302.
2. An assignee of a mortgage must see that his assignment refers, with sufficient distinctness, to the mortgage, to enable the register to make the necessary memorandum upon the margin of the record of the mortgage, to give notice of the assignment. It is no excuse for his not doing so, that the mortgage had not already been recorded. *Supreme Ct. Sp. T.*, 1867, *Moore v. Sloan*, 50 *Barb.*, 442.

REFERENCE.

1. Where the subject-matter of a claim is within the jurisdiction of the supreme court, and the parties voluntarily consent to a reference, in writing,

REFERENCE.

- and appear before the referee, and try the cause, jurisdiction is to be regarded as having been acquired, and the judgment entered upon the report of the referee is valid, and will be sustained on appeal, although the preliminary steps for ordering the reference were irregular or defective. *Supreme Ct.*, 1868, *Bucklin v. Chapin*, 35 *How. Pr.*, 155.
2. A referee has power, on the trial of the issues, to allow a new bill of particulars to be substituted for that annexed to the complaint. *Ct. of Appeals*, 1867, *Melvin v. Wood*, *Ante*, 438.
 3. Where a referee allows an amendment upon the trial, adding a new cause of action or a new defense, to the pleadings, the party aggrieved may seek relief by exception to his ruling, and an appeal to the general term, after judgment, but he is not restricted to that course. He may move, before judgment, to set aside the order. *Supreme Ct. Sp. T.*, 1868, *Ford v. Ford*, 35 *How. Pr.*, 321.
 4. When the facts alleged in the complaint, and proved on the hearing, entitle the plaintiff to equitable relief, and no question has been raised touching the mode of trial, a referee, to whom the trial may be referred, is bound, in obedience to section 275 of the Code, to grant the plaintiff any relief, legal or equitable, to which his allegations and proof entitle him. *Ct. of Appeals*, 1868, *Armitage v. Pulver*, 37 *N. Y.*, 494.
 5. In an action upon a contract, a finding of performance is sufficient, without setting forth the particular acts done by way of performance. *Supreme Ct.*, 1867, *Sermont v. Baetger*, 49 *Barb.*, 362.
 6. A finding of a referee, that the assignor had no actual design to defraud his creditors by making the assignment, but intended to apply his property to the payment of his debts, preferring and securing his surety and indorsers, is equivalent to saying that the assignment was made in good faith, and without any intent to defraud creditors. *Ct. of Appeals*, 1863, *Casey v. Janes*, 37 *N. Y.*, 608.
 7. Upon the finding of a referee that a will, made when the testator was of sound mind and memory, and when no improper influences controlled him or biassed his judgment, was destroyed by him through fraud and undue influence,—*Held*, that the court might sustain a judgment declaring that such will yet remained, in legal effect, a valid will, and might be established as such. *Supreme Ct.*, 1867, *Voorhis v. Voorhis*, 50 *Barb.*, 120.
 8. A referee is not required to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to negative in express terms any other facts. Facts not found are necessarily negated by implication. [Code, § 272; 27 *How. Pr.*, 1, and cases there cited.] *Supreme Ct.*, 1867, *Sermont v. Baetger*, 49 *Barb.*, 362.
 9. It is the duty of a party, if not satisfied with the facts found, and he desires other findings of fact in addition thereto, to move the court, before the time for excepting has expired, to send the case back to the referee to have him find one way or the other upon the other material questions

SERVICE.

of fact in issue and not passed upon. [30 N. Y., 211.] If nothing of this kind is done, the presumption arises that the referee has found all the material questions of fact against the defeated party. *Supreme Ct.*, 1863, *Lefler v. Field*, 50 *Barb.*, 407.

10. A referee cannot, after the delivery of his report, and on settlement of the case for an appeal, make any additional findings of law or fact. Upon the delivery of such report, the jurisdiction of the referee is determined, and he cannot afterwards make any new or other findings of fact or law to sustain or overthrow his report. [27 *How. Pr.*, 3; 33 *Id.*, 385.] *Supreme Ct.*, 1867, *Voorhis v. Voorhis*, 50 *Barb.*, 120.
11. Where a judgment on the report of a referee had been reversed, and a new trial ordered, before him, and on the new trial he found substantially the same facts and rendered the same judgment,—*Held*, that a new trial must be ordered, and the order of reference vacated. *N. Y. Superior Ct.*, 1866, *Bellows v. Folsom*, 4 *Rob.*, 43.

EXCEPTIONS, 1, 2; EXECUTORS AND ADMINISTRATORS, 1, 2; DOWER; FORECLOSURE, 2.

REPORT

APPEAL, 13, 14, 16; REFERENCE.

RESTITUTION:

Where judgment for the plaintiff in an action of ejectment, is reversed, and a new trial ordered, restitution to the plaintiff of the premises in question will be ordered, as of course, but without prejudice to the rights, if any, of a purchaser *pendente lite*. *N. Y. Superior Ct.*, 1863, *Costar v. Peters*, *Ante*, 53.

SERVICE (AND PROOF OF).

1. Service of process upon a convict in the State prison is valid, and gives the court jurisdiction. *Ct. of Appeals*, 1867, *Davis v. Duffie*, *Ante*, 478.
2. The suspension of civil rights which the statute (2 *Rev. Stat.*, 701, § 19) declares to be the effect of a sentence to State prison, does not give him any immunity from actions, nor suspend the rights of others. *Ib.*
3. An order to show cause in proceedings against an insolvent bank,—*Held*, properly served upon the vice-president, he being also a director. *Supreme Ct.*, 1867, *People v. Central City Bank*, 35 *How. Pr.*, 428.
4. Where an order required that if the defendant refused to refund certain moneys within twenty days after service of a copy, a judgment should be set aside and vacated, but did not in terms require a personal service upon the defendant,—*Held*, that a service upon his attorney was sufficient. *Supreme Ct.*, 1867, *Flynn v. Bailey*, 50 *Barb.*, 73.

SHERIFF.

5. The proof of the absence of a defendant necessary, in order to obtain an order for service of summons by publication, under section 135 of the Code of Procedure, must be by affidavit, and the return of a sheriff is not sufficient even as a part of the proof. But if the order shows that the fact appeared to the judge's satisfaction by affidavit, it is no objection that the sheriff's return was also produced on the application, nor that the affidavit was made by the plaintiff in the action. *Supreme Ct.*, 1868, *Waffle v. Goble*, 35 *How. Pr.*, 356.
6. Where the plaintiffs effect service by publication, they must, under section 246, subd. 3, of the Code, apply to the court, and make proof of the demand, before entering judgment, notwithstanding that the defendant's attorneys have appeared and demanded a copy of the complaint. *Supreme Ct.*, 1867, *Downer v. Mellen*, 50 *Barb.*, 232.
7. Plaintiffs cannot avail themselves of a service by publication as a foundation for entering judgment by default, and yet insist that an appearance by attorney, given in the cause, is equivalent to personal service, in order to preclude the necessity of application to the court for judgment. *Ib.*
8. *It seems*, that a defendant served by publication is entitled to appear by attorney for the purpose of having notice of the application to the court for judgment. *Ib.*

SET-OFF.

1. In an action by an assignee of a non-negotiable demand, the defendant is not entitled to set off against it a demand against the assignor which was not due and payable at the time of making the assignment. *Ct. of Appeals*, 1867, *Martin v. Kunzmüller*, 37 *N. Y.*, 396.
2. The relative rights of parties under provisions of the Revised Statutes regulating set-offs are not modified by the provisions of the Code of Procedure, which allow assignees to sue in their own names. *Ib.*
3. The condition in the statute, that "the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him,"—does not apply to the nature only, but to the state or condition of the demand. *Ib.*
4. The case of *Maas v. Goodman* (2 *Hill.*, 275), overruled. *Ib.*

SHERIFF.

1. The right of a purchaser of the property of a firm, who buys subject to an attachment issued on a partnership debt and levied on the interest of a part of the partners, is subordinate to that of the sheriff under the attachment and the execution issued therein, and such purchaser has, therefore, no right of action against the sheriff on the ground of having sold the interest of such two partners, although the sale was made in small parcels, to

SPECIFIC PERFORMANCE.

- many persons unknown to the plaintiff. *N. Y. Superior Ct.*, 1866, *Berry v. Kelly*, 4 *Rob.*, 106.
5. The sheriff not directed by the court as to the manner of executing process. *Matter of Steamship Circassian*, 50 *Barb.*, 490.

SHIPPING.

1. A lien given by a State statute upon a domestic ship for repairs or supplies may be enforced by proceedings pursuant to the statute in a State court. The jurisdiction of the United States courts is not to be regarded as exclusive of the power of the States to authorize proceedings *in rem* in the case of domestic vessels. [Reviewing authorities.] *Supreme Ct. Chambers*, 1867, *Matter of the Steamship Circassian*, 50 *Barb.*, 490; *Supreme Ct.*, 1867, *Bird v. Steamboat Josephine*, *Id.*, 501.
2. Where services are rendered at one place under an express contract made at another place, the former place is, by the authorities, to be regarded as the place where the debt was contracted; and, if it be without the State, the statute does not give a lien upon the vessel therefor, although the express contract was made within the State. *Supreme Ct.*, 1867, *Mullin v. Hicks*, 49 *Barb.*, 250.

SATISFACTION-PIECE.

EXECUTION, 1.

SPECIFIC PERFORMANCE.

1. One who has agreed by parol to convey specified lands to another, if the latter will make specified improvements upon them, may be decreed to make specific performance of the agreement, upon his part, when the required improvements have been made by the plaintiff. *Ct. of Appeals*, 1867, *Lobdell v. Lobdell*, *Ante*, 56.
2. The promise to make improvements involves loss to the party making them, and is a valuable consideration sufficient to sustain the promise to convey. *Id.*
3. Specific performance of a contract for the sale of lands refused, where the purchaser had obtained the contract from the defendant, an invalid widow living in seclusion, without suggesting her seeking advice upon the subject, and where, also, it appeared that she had misapprehended the terms of payment agreed upon. *Supreme Ct. Sp. T.*, 1867, *Cuff v. Dorland*, 50 *Barb.*, 438.
4. Whether the court may entertain an equitable action to compel specific performance of a covenant to pay an assessment,—*Query?* *Rector, &c. of Trinity Church v. Higgins*, 4 *Rob.*, 372.
5. Of the right of specific performance of covenants between the owners of

STATUTES.

different parcels of land establishing servient and dominant easements, as distinguished from the protection of legal easements, or of rights dedicated to the public. *Perkins v. Coddington*, 4 *Rob.*, 647.

6. In what cases a strict tender is unnecessary, on account of incumbrances on the land, before bringing an action for specific performance; and of excuses for delay in the commencement of such action. *Kerr v. Purdy*, 50 *Barb.*, 24.

STAMPS.

1. A several instrument signed by several obligers in different sums,—*Held*, to require but one stamp; and that, if it were regarded as requiring several, yet if it had but one, a recovery against one of the obligors might be sustained. *Supreme Ct.*, 1867, *Ballard v. Burnside*, 49 *Barb.*, 102.
2. Omission to cancel by initials and date, instead of a simple cross,—*Held*, not to invalidate the instrument, under the act of 1864. *Ib.*
3. The omission to affix a revenue stamp to an instrument requiring a stamp, will not invalidate the instrument, unless such omission be with intent to defraud the government of the stamp duty. *Supreme Ct.*, 1867, *Vorebeck v. Roe*, 50 *Barb.*, 302.
4. An instrument, void under the statute for lack of stamp, may be made valid by an amendment of the statute which takes away the penalty of annulling contracts for lacking stamps. *Supreme Ct.*, 1867, *Hoppeck v. Stone*, 49 *Barb.*, 524.
5. Under the provisions of the Internal Revenue Law allowing the collector to affix stamps to mortgages, &c., when they had been omitted without intent to defraud, with a proviso "that no right acquired in good faith before the stamping of the instrument and the recording thereof, if such record be required by law, shall be affected by such subsequent stamping,"—rights intervening are not saved in the case of *chattel* mortgages, for *chattel* mortgages are not such as require to be recorded, but only filed; and the statute should not, in a doubtful case, receive a construction which would invalidate the security for the want of the stamp. *Supreme Ct.*, 1867, *Vail v. Knapp*, 49 *Barb.*, 299.

STATUTES.

1. The act of 1866 (*Laws of 1866*, 114, ch. 74),—creating a Metropolitan Sanitary district and Board of Health,—is a public or general statute, and not a local one; for the reason that it confers general powers upon the officers created by it, and contains penal provisions applicable to all persons, wherever residing, who violate the act. *N. Y. Superior Ct. Sp. T.*, 1868, *Burnham v. Acton*, *Ante*, 1.
2. The act of 1867 (2 *Laws of 1867*, 2410, ch. 956), inasmuch as it is in aid
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- of and additional to the former act, is likewise to be deemed a public or general statute. *Ib.*
3. The explanation given in *Bretz v. Mayor, &c. of New York* (3 *Ante*, 478), of the distinction between public and private or local statutes—re-asserted. *Ib.*

ACTION, 1, 2.

STAY OF PROCEEDINGS.

CERTIORARI, 2; INJUNCTION.

STIPULATIONS.

1. Where, by a stipulation signed by the attorneys for the respective parties in a former action, a counter-claim set up by the defendant was expressly withdrawn from that action before trial, upon an agreement that it should be "without prejudice to the defendant's right to maintain an action thereon against the plaintiffs," and the same was not to be affected by the future litigation of that action;—*Held*, that such stipulation was admissible in evidence in a second action between the same parties, brought by the defendant in the former action against the plaintiffs therein, to answer and overcome the *prima facie* evidence of the record of the former trial, and to show that the plaintiffs' cause of action in the second suit was not in fact tried or determined in the former action. *Supreme Ct.*, 1868, *Foster v. Milliner*, 50 *Barb.*, 385.
2. A stipulation that a judicial sale may be had pending the action, and that no judgment should be entered until such time as a certain question "shall be tried and decided on the issue so raised by the answer," &c., does not confine the court to any narrower rule or mode of trial than if the same question had been tried in its actual order, without any stipulation; and hence it is competent to the court upon the trial, notwithstanding the stipulation, to allow an amendment of the pleadings, or if a material fact is assumed without objection, the judgment may be sustained as if that fact had been proved. *Ct. of Appeals*, 1867, *Ballin v. Dillaye*, 37 *N. Y.*, 35.

SUMMARY PROCEEDINGS.

1. The provisions of the statute for summary proceedings to recover possession of land, as to the issue and return of summons, its service, and proof thereof, and the duty of the person receiving summons upon a substituted service, and as to *certiorari* to review the adjudication,—amended. 2 *Laws of 1868*, 1930, ch. 828.
2. The provisions of the Revised Statutes, authorizing dispossession of tenants in certain cases, amended by adding provisions for dispossession when houses are occupied as bawdy houses. 2 *Laws of 1868*, 1724, ch. 764.
3. Under 3 *Rev. Stat.*, 5 ed., 836, § 28, subd. 2,—authorizing summary proceedings to recover the possession of land when a demand shall have been

SUPPLEMENTARY PROCEEDINGS.

made, or three days' notice in writing, requiring payment or the possession of the premises, shall have been served, &c.,—a demand of the rent alone must be a personal demand. If the plaintiff relies on a written notice, under the second clause, he must show a notice in the alternative, requiring payment or possession. *Supreme Ct.*, 1867, *People ex rel. Simon v. Gross*, 50 *Barb.*, 231.

INJUNCTION, 10.

SUMMONS.

Where there is an incongruity between the summons and the complaint, served at the same time, the former containing a notice that in default of an answer the plaintiff will take judgment for a specified sum mentioned in the complaint, whereas the latter is for a tort, the proper remedy to rectify such a variance is a motion to set aside the complaint, and not a motion to set aside the summons. [Citing many authorities.] *N. Y. Superior Ct.*, 1865, *Bender v. Comstock*, 4 *Rob.*, 644.

JOINT DEBTORS.

SUPPLEMENTARY PROCEEDINGS.

1. It is not necessary, where execution appears to have been issued after the expiration of five years from the entry of the judgment, that the plaintiff should show that it was issued by the order of the court, or that a prior one had been issued within the five years, and returned unsatisfied. These may be presumed in support of the order; and the remedy of the defendant, for the irregularity in this respect, is to apply to the court to set aside the order. *Supreme Ct.*, 1867, *Union Bank of Troy v. Sargeant*, 35 *How. Pr.*, 87.
2. An order in supplementary proceedings, in the nature of an injunction against a debtor, does not justify him in refusing to comply with the judgment of a court of competent jurisdiction, in an action to which the creditor in the supplementary proceedings is a party. Such a judgment is a complete protection to him, and he cannot be made responsible for complying with it, as being a disobedience of the injunction. *N. Y. Superior Ct. Sp. T.*, 1868, *Butler v. Niles*, 35 *How. Pr.*, 329.
3. A payment by the debtors of a judgment debtor, in obedience to an order made by a judge, under section 294 of the Code of Procedure, requiring such payment upon the judgment debt, is a valid payment, although no notice of the proceedings is given to the judgment debtor. Such a payment is a full protection to the debtor against an assignee of the debt, who has not given notice to the debtors that the debt has been assigned to him. *Ct. of Appeals*, 1868, *Gibson v. Haggerty*, 37 *N. Y.*, 555.
4. Supplementary proceedings to compel the debtors to pay the debt upon and toward the satisfaction of a judgment against their creditor, may be taken under section 294, without any proceeding against the creditor (the

TAXES.

- judgment debtor), under section 292, for his examination. The proceedings authorized by these two sections, respectively, are independent of each other. Whether notice shall be given to the judgment debtor of the proceedings under section 294, rests in the discretion of the judge. *Id.*
5. Where a receiver has been appointed in proceedings supplementary to execution, the defendant cannot, on appeal from the order of his appointment, avail himself of objections to the preliminary affidavit, which were not made before the judge granting the order. The proper course to raise such objections is by a motion to vacate the order. *Supreme Ct.*, 1867, *Union Bank of Troy v. Sargeant*, 35 *How. Pr.*, 87.
 6. Supplementary proceedings are to be regarded, not as a special proceeding entitling the successful party to the costs of an action in the case of attachments for contempt, &c., but as proceedings in the action, and entitle him only to costs as such. *Supreme Ct.*, 1868, *Seeley v. Black*, 35 *How. Pr.*, 369.

SUPREME COURT.

1. The supreme court, sitting in one of the judicial districts of the State, has no jurisdiction to grant an injunction in an action brought to restrain proceedings in an action pending in another district. *Supreme Ct.*, 1868, *Schell v. Erie R. R. Co.*, *Ante*, 287.
2. That a decision in one district, at general term, is a conclusive authority in the other districts. *Supreme Ct.*, 1858, *Hardenburgh v. Crary*, 50 *Barb.*, 32.

SURROGATES' COURTS.

1. A legatee and devisee named in a will, though not a party to the proceedings before the surrogate for the probate of the will, may appeal from the decree of the surrogate refusing to admit the will to probate, without first obtaining leave from the court to do so. *Supreme Ct.*, 1868, *Lewis v. Jones*, 50 *Barb.*, 645.
2. On appeal from the surrogate's refusal to admit a will to probate, the appellant cannot, for the first time, suggest the existence of further proof. *Supreme Ct.*, 1867, *Abbey v. Christy*, 49 *Barb.*, 276.

TAXES.

1. An insurance company is not exempt from a tax imposed on corporations "doing business" in this State, on the ground they are no longer doing business, because they have discontinued issuing new policies, and are only engaged in collecting premiums and paying losses on old policies. Collecting premiums and paying losses is "doing business," within the meaning of the tax-laws. *N. Y. Common Pleas Sp. T.*, 1868, *Smith v. International Life Assurance Co. of Boston*, *Ante*, 11.

TRADEMARKS.

2. Corporations are equally liable with individuals to be compelled to pay a tax imposed upon their personal property, by a proceeding under *Laws of 1843*, ch. 230, Art. II., §§ 12, 13. *Ib.*
3. The amount determined by assessors to be due under the "Act to subject certain debts, owing to non-residents, to taxation" (*Laws of 1851*, 721, ch. 371), is conclusive on that point until set aside by a proceeding instituted for such purpose; and it is not within the authority of the county treasurer to question its accuracy or legality when called upon to issue his warrant for the collection of the tax assessed upon such estimate. *Ct. of Appeals*, 1867, *People v. Halsey*, 37 *N. Y.*, 344.
4. The provisions of the statute for sales for unpaid taxes, requiring notice of redemption to be published six months before the expiration of two years from the last day of the sale, must be strictly performed in order to divest the title of the owner. The comptroller's deed is not supported by presumption of regularity in the case of subverting the title of an individual owner, and the provision relative to the notice of the redemption is peremptory, and performance must be proved to support the title under the deed. *Supreme Ct.*, 1867, *Bunner v. Eastman*, 50 *Barb.*, 639.

TENDER.

Where the covenant to pay sued upon is independent of, and to precede, any act to be done or performed by the plaintiff, an action accrues upon failure of payment, and it is not necessary to aver performance on the part of the plaintiff before suing. *Ct. of Appeals*, 1867, *Paine v. Brown*, 37 *N. Y.*, 228; *Supreme Ct.*, 1867, *Karker v. Haverly*, 50 *Barb.*, 79.

TIME (COMPUTATION OF).

1. In a contest between two receivers, both appointed on the same day, and claiming, in hostility to each other, the administration of the estate of an insolvent, the court will inquire into the fractions of the day to determine the actual priority of appointment. *Supreme Ct.*, 1867, *People v. Central City Bank*, 35 *How. Pr.*, 428.
2. Neither the mere preparation and verification of the papers for an application, nor the mere fact of first obtaining actual possession of the assets, can settle the question of legal right in respect to priority. *Ib.*

TRADEMARKS.

1. In an action brought to enjoin the defendant from infringing the plaintiffs' trademark, if the plaintiffs can be pronounced the first to use the word claimed by them, although it be a popular term, and one in general use,—*e. g.*, the word Bismarck,—as a designation of a particular style of goods made by them, and to have acquired by its manufacture and sale under that name a valuable interest in such designation, the defendant must be

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- estopped from using it for the same purpose. The plaintiffs had the right to appropriate such name, in common with others, for a new purpose, and having done so, are entitled to avail themselves of all the advantages of their superior diligence and industry. *N. Y. Common Pleas Sp. T.*, 1868, *Messerole v. Tynberg*, *Ante*, 410.
2. There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object, and a new design adopted by a manufacturer. Both give currency to the articles to which they are applied, and distinguish them from other manufactures of a similar character. *Ib.*
 3. All the essential requisites to the plaintiff's right to protection flow from the prior use of a term, symbol, or word, which has created for his manufacture a celebrity or value; and the burden of showing that the claim of priority is unfounded, or the absence of any injury resulting from its imitation, rests upon the defendant. *Ib.*
 4. The plaintiff invented a new medicine, and formed the compound word "*Ferro-Phosphorated*," to designate it; such compound word being new.—*Held*, that he was entitled to the exclusive use of this compound word, and to an injunction to restrain a rival dealer from using that word to designate a similar medicine. *N. Y. Common Pleas Sp. T.*, 1867, *Caswell v. Davis*, *Ante*, 6.
 5. The principles upon which equity enjoins a defendant from imitating the plaintiff's trademarks, do not apply to the publication of newspapers, except so far as to protect the proprietors of a paper in the use of the name adopted by him for such paper. *N. Y. Superior Ct. Sp. T.*, 1868, *Stevens v. De Conto*, *Ante*, 47.
 6. The use of the word "*Akron*" as a name for cement, being the name of the place near which complainants manufactured it,—protected as their trademark. *Supreme Ct.*, 1867, *Newman v. Alvord*, 49 *Barb.*, 588.

TRIAL.

1. The court, on a motion at special term, may order a second action to be placed on the calendar, next to a prior action for a similar cause, between the same parties, and that they may both be tried before the same judge at the same term. But it will not control the discretion of the justice before whom the same may be triable, as to deciding which shall be first tried, or whether either shall be postponed. *N. Y. Superior Ct. Sp. T.*, 1865, *Maretzek v. Caldwell*, 4 *Rob.*, 666.
2. An objection taken after the trial of an action is begun, that it should have been tried by a jury, should be overruled. After the trial has commenced, is not a proper time for determining whether it should be a jury trial, when there are several issues, some of which are clearly triable without a jury. If a party wishes to secure his right of trial of any of the issues by a jury, he should make his application beforehand, so that such right may be separately passed upon before the trial. If he waits until

- the trial is entered upon before applying for a jury trial, this will be a waiver. *N. Y. Superior Ct.*, 1867, *McKeon v. See*, 4 *Rob.*, 449.
3. Defects in pleading, as it respects the form and order of stating facts, are to be settled on motion to the court before the trial; and such objections, made after the parties come to the circuit for trial, are not to be encouraged. *Supreme Ct.*, 1867, *Stickney v. Blair*, 50 *Barb.*, 342.
 4. A motion for a nonsuit, or a motion to dismiss the complaint, to be effectual, must specify the defects supposed to exist. It is not sufficient to make a general objection. *Ct. of Appeals*, 1868, *Binsee v. Wood*, 37 *N. Y.*, 526.
 5. Although, in an action for a breach of a contract, an adherence by the plaintiff's counsel to an untenable point of law made in his opening,—*e. g.*, that the plaintiff is entitled to a sum fixed in the contract, as liquidated damages,—might justify a dismissal of the complaint, its abandonment immediately after being made, accompanied by an offer to prove the damages, which were specially stated in the complaint, and an application to amend the demand for relief, will entitle him, upon proper evidence, to recover such damages. *N. Y. Superior Ct.*, 1867, *Ward v. Jewett*, 4 *Rob.*, 714.
 6. When the party voluntarily accepts an immaterial issue, and gives evidence upon it, it does not lie with him afterward to complain that the court allowed the other side to answer him. [8 *Pick.*, 551; 8 *Cranch*, 500; 5 *Day*, 260; 5 *N. H.*, 301.] *Ct. of Appeals*, 1868, *Blossom v. Barrett*, 37 *N. Y.*, 438.
 7. Evidence offered in support of immaterial issues may be rejected on the trial, although not objected to by either party. [2 *N. Y.* (2 *Comst.*), 97; 24 *Wend.*, 105.] *Ct. of Appeals*, 1867, *Bronner v. Frauenthal*, 37 *N. Y.*, 166.
 8. Questions of evidence determined on appeal are *res adjudicata* upon a new trial ordered by the appellate court. *N. Y. Superior Ct.*, 1866, *Ayres v. O'Farrell*, 4 *Rob.*, 668.
 9. In an action for conversion of chattels, the plaintiff having testified in his own behalf to his opinion of the value of the chattels,—*Held*, that it was competent on cross-examination to ask him what he paid for them. His answer might be regarded by the jury in determining what weight to assign to his estimate of value; even although it appeared that he purchased them in mass with other articles. *Ct. of Appeals*, 1867, *Wells v. Kelsey*, *Ante*, 234.
 10. A request to charge must rest on facts which are, at least, possible in the case, in some aspect of the evidence; and where an hypothesis or contingency, not resting upon any evidence in the case, is the basis of a request to the judge for a direction to the jury, it is no error to refuse to give the direction asked for. *Supreme Ct.*, 1867, *Hope v. Lawrence*, 50 *Barb.*, 262.
 11. In an action to recover damages on behalf of the next of kin for injuries sustained by death caused by the defendant, it is proper to charge

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- the jury that the burden of proof is upon the plaintiff to prove the pecuniary injury, and such facts as could enable the jury to determine what would be a fair and just compensation, with reference thereto, to the next of kin, to entitle the plaintiff to recover more than nominal damages; and also that the jury have no arbitrary discretion in regard to the amount of damages, but must be governed by the weight of evidence as to what would be a fair and just compensation with reference to the pecuniary injuries sustained by the next of kin. [24 N. Y., 471; 29 Id., 252.] *Ct. of Appeals*, 1867, *McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y., 287.
12. Upon proof of a contract to pay as soon as the obligor could, it is error to charge the jury that she was to pay as soon as she *conveniently* could. *Supreme Ct.*, 1867, *Johnson v. Plowman*, 49 *Barb.*, 472.
13. Commenting on the object or contents of a will obtained from an aged person, as bearing on the animus of an assault which arose in removing such person from the house of one party to another, which will was not admitted in evidence on the trial,—*Held*, error, for which the verdict should be set aside. *N. Y. Superior Ct.*, 1866, *Crossman v. Harrison*, 4 *Rob.*, 38.
14. *It seems*, that where a counter-claim is proved without contradiction, the justice should direct defendant's damages to be assessed, rather than leave it to the jury to reject it. *N. Y. Superior Ct.*, 1866, *Ayes v. O'Farrell*, 4 *Rob.*, 668.
15. On the trial of issues of fact in an equity case, the court, in the exercise of a sound discretion, may submit to the jury additional issues arising upon the proofs, and material to the final determination; and on motion, may amend the complaint in conformity with the proof and the finding, if no affidavit of surprise and prejudice is made in opposition. *Ct. of Appeals*, 1867, *Farmers' & Mechanics' Bank v. Joslyn*, 37 N. Y., 353.
16. The court, having directed the jury to find a special verdict upon questions submitted in writing to their consideration, may withdraw any of such questions from their consideration and instruct them they need not answer it. This is purely a matter of discretion, over which the court on appeal will not exercise control. *N. Y. Superior Ct.*, 1867, *Taylor v. Ketchum*, 35 *How. Pr.*, 289.
17. In an action for unliquidated damage for torts, it is not error for the judge to instruct the jury as to the amount necessary to be recovered in order to entitle the plaintiff to costs. *Ct. of Appeals*, 1868, *Waffle v. Dillenbeck*, *Ante*, 457.
18. An assessment of damages at the circuit by a jury in the absence of the defendant, is valid. The waiver of the *right* to a trial by jury resulting from his failure to appear, does not preclude the plaintiff from proceeding before the jury. *N. Y. Superior Ct.*, 1865, *Hendricks v. Carpenter*, 4 *Rob.*, 665.

EXCEPTIONS; FORMER ADJUDICATION, 9; ISSUES; NEW YORK SUPERIOR COURT, 2; WITNESS.

UNDERTAKING.

TRUSTEES.

1. The omission of one named in a will as trustee to qualify as such, or to claim the trusteeship for a period of twenty years, permitting other persons during all that time to perform the duties without challenge, must be deemed a renunciation and refusal on his part to accept the trust. And it is competent to apply to the supreme court, in case of such a vacancy, for the appointment of another person. *Ct. of Appeals*, 1867, *Matter of Robinson*, 37 *N. Y.*, 261.
2. In order to charge trustees of an express trust with costs of an action prosecuted by them as such, a special order of the court is necessary. The ordinary judgment is not enough, without something to show that mismanagement or bad faith on the part of the plaintiff was made to appear to the court. *Ct. of Appeals*, 1863, *Slocum v. Barry*, *Ante*, 399.
3. The proper practice in such a case is to make a specific application to the court, founded on notice to the other party. *Ib.*
4. As to when a trustee is chargeable with interest to be computed with annual rests. *King v. Talbot*, 50 *Barb.*, 453.
5. Of the duty of trustees in respect to the selection of investments for trust funds. *Ib.*
6. Although on an application for the removal of a trustee, and a settlement of his accounts, all persons interested should have notice, yet in a proceeding simply for the appointment of a trustee to execute trust duties and powers, for the faithful performance of which security is always required, it is a matter of discretion with the court as to whom notice shall be given. The court in which the application is made may determine and direct in that regard; the appointment being always open to review on the application of any party interested, and who may not have been informed of the proceeding. [4 *Beav.*, 215; 2 *Head's Tenn.*, 289; 1 *Johns. Ch.*, 438; 3 *Ves.*, 314; 11 *Id.*, 429; 15 *Id.*, 14 n.; 16 *Id.*, 321; 2 *Paige*, 15; 1 *Johns. Ch.*, 349.] *Ct. of Appeals*, 1867, *Matter of Robinson*, 37 *N. Y.*, 261.
7. The court of appeals will not interfere with the discretion of the supreme court in the selection of a new trustee, merely on the ground that the appointee had unsettled controversies with the trustee deceased, in regard to matters appertaining to the trust. *Ct. of Appeals*, 1867, *Matter of Robinson*, 37 *N. Y.*, 261.

UNDERTAKING.

The defendants gave an undertaking upon an appeal taken by two appellants, that "if the said judgment so appealed from, or any part thereof, be affirmed, the said appellants will pay the amount," &c. The judgment was affirmed as against *one* appellant, but was *reversed* as to the other. —*Held*, that the defendants were liable upon their undertaking. *Ct. of Appeals*, 1867, *Seacord v. Morgan*, *Ante*, 249.

VARIANCE.

USURY.

Where a contract or obligation is given for two or more separate and independent things or objects, having no connection with each other, and one of these objects is the security of a usurious debt, although the contract or obligation is altogether void for that reason, and no action could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that it be surrendered, all that the statutes of usury have done affecting the complainant's right to relief, is to forbid that any payment on account of such debt shall be made a condition of relief. As to other conditions, the statute is silent, and the court is left to administer relief upon those principles which govern the subject generally. When, therefore, the plaintiff asks that a mortgage be canceled as a cloud upon the title to his lands, and that a court of equity shall so direct, in virtue of its power and its disposition to enforce his equitable rights, the court may not require that he pay a usurious debt, or any part thereof, or any interest thereon, but it may require the performance of any other duty which is just to the adverse party, unembarrassed by the statutes in question. In equity the mortgagor in such case stands, in reference to debts not usurious secured by the mortgage, in the same attitude as a complainant seeking to redeem. He must pay what in law and in equity he owes. *Ct. of Appeals*, 1867, *Williams v. Fitzhugh*, 37 *N. Y.*, 444.

VARIANCE.

1. In an action against carriers, the plaintiff alleged in his complaint that before the arrival of the goods the carriers were directed to change the destination and deliver them at a distant place, which they neglected to do, and the goods were lost. Upon the trial this was not proved, but it was proved that shortly before the arrival of a part of them at the place of original destination, the consignee demanded them from the agents of the defendants, who refused to deliver them.—*Held*, that the cause of action was unproved in its entire scope and meaning, and a judgment for the plaintiff could not be sustained.* *N. Y. Superior Ct.*, 1863, *Rosebrooks v. Dinsmore*, 4 *Rob.*, 672.
2. Under a complaint alleging that the defendants agreed to deliver property to plaintiffs in consideration of plaintiffs transferring and releasing a claim they held against a third person, and averring a part performance, and suing for a breach as to the residue,—*Held*, that a variance, by proving only the sale of the debt, and not its release, nor the delivery of the demand to the defendants, was not material. *N. Y. Superior Ct.*, 1867, *Meriden Britannia Co. v. Zingsen*, 4 *Rob.*, 312.

* This decision has been reversed in the Court of Appeals. The report of the reversal will appear in our next volume.

WARRANT.

3. Variance between the amount of profits to which the plaintiff was entitled, as alleged in the complaint in an action for his share of the profits of a joint adventure, and the amount shown by the proof,—*Held*, not material. *N. Y. Superior Ct.*, 1867, *Strong v. Place*, 4 *Rob.*, 385.
4. Under an answer which alleges as a defense a fraudulent sale of a note, with a representation that it is good, the defense is not established where no fraud is proved, and the representation is found to be a warranty that the note was the "genuine" note of O., it being also found that the note was made by O., and the defect therein arises from his infancy. *Ct. of Appeals*, 1868, *Baldwin v. Van Deusen*, 37 *N. Y.*, 487.
5. In an indictment against a supervisor for corruptly voting a demand to be a county charge, although the time and place must be stated with certainty, they are not essential to be proved as stated, nor is the amount of the account allowed material. *Supreme Ct.*, 1866, *People v. Stocking*, 50 *Barb.*, 573.

WAIVER.

1. In an action for the recovery of specific personal property, the act of the plaintiffs in taking proceedings for the claim and delivery, and obtaining thereby possession of a portion of the goods, does not amount to a waiver of the right to issue process to arrest the defendants. The delivery of the property under the proceedings of claim and delivery, is not decisive of the plaintiffs' right; and if the plaintiffs succeed, they cannot have a right to recover a larger amount than the defendants are really bound to pay. *Supreme Ct.*, 1867, *Tracy v. Veeder*, 35 *How. Pr.*, 209.
2. Where the defendant had the whole of the day in which to deliver a satisfaction-piece,—*Held*, that the plaintiff's refusal to wait during the day for him to send for such satisfaction-piece, amounted to a waiver of any tender of it. *Supreme Ct.*, 1867, *Karker v. Haverly*, 50 *Barb.*, 79.
3. That a general appearance upon an appeal, and noticing it for argument, is a waiver of the right to have the appeal dismissed, as being too late. *Supreme Ct.*, 1866, *Pearson v. Lovejoy*, 35 *How. Pr.*, 193.
4. Defendant having notice of a complaint against his business in the city as a nuisance dangerous to public health, declined to appear before the Board of Health to litigate the question, but insisted on their want of power over the subject.—*Held*, that he could not complain, in a subsequent action, that their judgment upon the facts was held conclusive upon him. *Ct. of Appeals*, 1868, *Metropolitan Board of Health v. Heister*, 37 *N. Y.*, 661. *S. P.*, *N. Y. Superior Ct.*, 1867, *Reynolds v. Schultz*, 4 *Rob.*, 282.

CERTIORARI, 1; DOWER, 2.

WARRANT.

A criminal warrant for arrest for obtaining property by false pretenses, under the statute, which states the offense thus :—that the prisoner designedly

WITNESS.

and by false pretenses, did obtain from him, C. D., one sulky of the value of thirty dollars, the property of A. B., with intent to cheat and defraud him, the said C. D.,—states the offense sufficiently; and is a protection to the magistrate and officer who issue and execute it. These proceedings being by a magistrate exercising a general jurisdiction over the subject-matter, are to be regarded with favor, and when attacked collaterally, great latitude of construction is to be indulged in support of the jurisdiction. [Reviewing authorities.] *Supreme Ct.*, 1867, *Pratt v. Bogardus*, 49 *Barb.*, 89.

WILLS.

1. An habitual drunkard, while in the charge of a committee, not necessarily incompetent to make a will. [Reviewing many authorities.] *Supreme Ct.*, 1868, *Lewis v. Jones*, 50 *Barb.*, 645.
2. The provisions of the *Laws of 1860*, 607,—that a testator leaving husband, wife, child, or parent, shall not devise to benevolent, &c., societies more than one-half his estate, &c.,—is peremptory, and may be insisted on by any person who would derive a benefit therefrom, although not one of the relatives designated in the statute. And the one-half is to be computed with reference to the estate at the time of the testator's death.—*FULLERTON, J. Ct. of Appeals*, 1867, *Harris v. American Bible Society*, *Ante*, 421.
3. What amounts to undue influence which will avoid a will. *Seguine v. Seguine*, 35 *How. Pr.*, 336.
4. Probate of a will cannot be granted if there is no proof that the declaration publishing the will was made to *both* witnesses, nor any circumstance from which it can be inferred. *Supreme Ct.*, 1867, *Abbey v. Christy*, 49 *Barb.*, 276.
5. A legacy to a subscribing witness to a will is not void, under 2 *Rev. Stat.*, 65, § 50, where the will can be proved without the testimony of the witness; as, where such witness is a non-resident of the State, and the testimony of the other subscribing witness can be obtained. *So held*, notwithstanding the legatee witness was examined (though unnecessarily), to prove the execution of the will. *Ct. of Appeals*, 1867, *Cornwell v. Wooley*, *Ante*, 40.

WITNESS.

1. In an action for criminal conversation by the defendant with the plaintiff's wife, the wife cannot be a witness against her husband. At common law the husband and wife could not be witnesses for or against each other, and this rule of the common law is not changed by the provisions of the Code which abrogate the disqualification of witnesses by reason of their being parties. [5 *Seld.*, 153; 15 *How.*, 165; 30 *Barb.*, 506; 26 *Barb.*, 612; 38 *Barb.*, 419; 46 *Barb.*, 291; 47 *Barb.*, 419.] *Supreme Ct.*, 1868, *Hicks v. Bradner*, 35 *How. Pr.*, 118.

WITNESS.

2. In cases where husband and wife are admissible as witnesses against the other, they are not restricted to proving facts which could not be proved by any other witness. *Supreme Ct.*, 1867, *People v. Northrup*, 50 *Barb.*, 147.
3. The testimony of *parties* who appear as witnesses on the trial of a cause must be weighed by the same rules, substantially, which apply to the testimony of other witnesses. There are no exceptional rules which apply to such a case. If there can be any difference, it is only that the testimony of parties in their own favor should be more carefully scrutinized, and cautiously received by juries, than that of other witnesses. But this applies to both parties, and in all cases where they are witnesses, and contradict each other, the jury necessarily decide between them. *Supreme Ct.*, 1868, *Burnett v. Harris*, 50 *Barb.*, 379.
4. A provision of a statute prohibiting a party to an action from testifying as a witness to any transaction had *personally* by him with a person since deceased, does not exclude such party from testifying to the particulars of a transaction which took place between the deceased and a third person, in the presence of the witness. *Ct. of Appeals*, 1867, *Lobdell v. Lobdell*, *Ante*, 56.
5. Although a party is not permitted to assert or present evidence showing one state of facts to be true, and afterwards to assert or prove that his prior evidence is untrue, or not to be relied on, yet, where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or intentionally falsely, and there is no bad faith on the part of the party producing the witness, he is allowed to give evidence explaining, or even contradicting, his own witness. *Supreme Ct.*, 1867, *People v. Skeehan*, 49 *Barb.*, 217.
6. The rule that the judge may, in his discretion, admit or exclude disparaging questions not relevant to the issue, on the cross-examination of a witness, put to impair his general credit, does not allow cross-examining a witness as to whether specific disparaging declarations have been made against him by third persons. Such declarations, though made directly to the witness, are merely hearsay evidence. *Supreme Ct.*, 1867, *Hannah v. McKellip*, 49 *Barb.*, 342.
7. In the case of a witness who has given an opinion as to value, it is peculiarly proper, upon cross-examination, to test his means of knowledge, to scrutinize the grounds of his judgment, and to elicit such specific facts as may aid in applying and weighing his testimony. *Ct. of Appeals*, 1867, *Wells v. Kelsey*, *Ante*, 234.
8. Where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts stated by such witness against himself on his examination, evidence of

WITNESS.

general good character, or of good character for truth and veracity, in support of the witness, is incompetent. [29 Barb., 617.] *Supreme Ct.*, 1867, *Hannah v. McKellip*, 49 *Barb.*, 342.

DEPOSITION; DISCOVERY AND INSPECTION; EXAMINATION OF PARTIES; EVIDENCE; TRIAL, 9.

THE END.

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